Supreme Court, U.S.
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No. 07-630

In The
Supreme Court of the United States

MARY SCOTT,

Petitioner,

v.

METROPOLITAN HEALTH CORPORATION,
d/b/a METROPOLITAN HOSPITAL,
and MICHAEL FAAS,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether it is a violation of the Due Process Clause and an abuse of discretion for a court, pursuant to its "inherent powers," to issue sanctions against a party without holding a hearing as to any aspect of the litigation, where the sanctions—amounting to over $1,600,000—rely on findings that the party has acted with subjective bad faith and that she, not her attorneys, was "the driving force" behind any litigation misconduct.

2. In connection with meritorious proceedings under the False Claims Act, which resulted in payment of over $6,250,000 by the *qui tam* relator's employer, did the Sixth Circuit err in affirming $1,600,000 in attorneys' fees against the relator based on alleged litigation misconduct that affected neither the disposition nor the duration of her whistleblower retaliation action, which should have survived summary judgment based on established principles of employment law?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (App. B, 3a) is unpublished, but is unofficially reported at 2007 WL 1028853. The opinion of the U.S. District Court for the Western District of Michigan granting summary judgment (App. G, 133a) is published at 375 F.Supp. 2d 626. The district court's opinion issuing sanctions (App. E, 96a) is unpublished, but may be found at 2005 WL 2405961, and its order setting the amount of sanctions (App. C, 61a) is unpublished, but may be found at 2005 WL 3434830.

JURISDICTION

The court of appeals issued its opinion on April 3, 2007. Rehearing and hearing en banc were denied on August 13, 2007 (App. A, 1-2a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the application of 31 U.S.C. § 3730(h) and F.R.C.P. 26(c), 37(c), and 56(g), which are reprinted at Appendix Q, pp. 240-45a, and the Due Process Clause of the Fifth Amendment to the United States Constitution, which states, in relevant part, "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Respondent Metropolitan Health Corporation ("Metro") hired Petitioner Mary Scott ("Scott") as

Senior Vice President of Network Development in 1997. (App. G, 138a). Thereafter, Ms. Scott identified fraudulent Medicare billing practices, which she reported, first to Metro's CEO, Respondent Michael Faas, in the summer of 2001, (App. 165-67a), then in April 2002, to its Board and to its outside counsel. (App. 151-53a). This led to an action under the False Claims Act, 31 U.S.C. § 3729 *et seq.*, in which the government intervened (App. 168-69a), and Ms. Scott, as *qui tam* relator, alleged Respondents had filed over $40 million in false claims. Respondents settled these claims for over $6.25 million (App. B, 26a). Scott's complaint also included a retaliation claim under 31 U.S.C. § 3730(h), alleging Respondents reacted to her protected whistleblowing activities by reducing her responsibilities, undermining her authority, and finally, in January 2003, terminating her employment (App. G, 164a). This claim was not settled.

In June 2005, following a lengthy and contentious discovery and briefing process, the district court granted summary judgment to Respondents on the retaliation claim. (App. H, 189-90a). It held that Respondents did not have effective notice of Scott's protected activities until April 2002, when she reported the fraud to the Board, and that all of the alleged retaliation that occurred prior to that date was irrelevant. (App. G, 180a). Although Scott was terminated after Metro had notice of her protected activities, the court held she had not shown Metro's stated reasons for firing her to be pretextual. (App. 182a). The court characterized her as difficult and combative, and concluded she was fired for either this behavior or misconduct. (App. 182-83a).

The alleged misconduct arose during Metro's internal investigation of Scott's allegations, with which she was accused of interfering by falsifying draft minutes of a February 7, 2002 board meeting. (App. 156-63a). Scott admitted revising her assistant's draft minutes by deleting and replacing a paragraph she said was inaccurate, and deleting reference to a motion she did not believe occurred. (App. 159-60a). In June 2002, Metro suspended her with pay, and in January 2003, she was terminated. (App. 163-64a). Metro did not fire Scott for cause, but instead falsely claimed her position was eliminated in a reorganization. (App. 164a). Ignoring the short time between Scott's whistleblowing and her termination, as well as Metro's failure to discipline other personnel accused of criminal or fraudulent behavior, the court found that Metro's decision to terminate Scott was not pretextual because of its honest belief that she was a poor manager and that she had falsified the minutes. (App. 182a).

Following summary judgment, which Scott immediately appealed, Respondents moved for an award of their costs and attorneys' fees as sanctions (App. E, 96-97a). The district court declined to hear oral argument on Respondents' motion. (App. 97a). Without ever seeing Scott, much less holding an evidentiary hearing, it found she withheld evidence, primarily tapes of the February 7 meeting, and made false statements regarding the tapes and minutes of the meeting in affidavits accompanying her summary judgment filings. (App. 113-14a). It also concluded, similarly without a hearing, that Scott was solely responsible, and that she alone, and not her attorneys, should be sanctioned (App. 125a, n.12), despite

evidence that: (1) prior to litigation, Scott was advised by counsel not to turn over a partial tape of the meeting, (App. 104-05a); (2) during discovery, her attorneys possessed, analyzed, and failed to turn over the disputed tapes, (App. 107-08a); and (3) during litigation, her attorneys delayed submission of other tapes to await a pending ruling. (App. 110-11a). The court found that Scott intentionally violated Federal Rules of Civil Procedure 26(g), 37(c), and 56(g), and awarded Respondents the attorneys' fees they incurred between May 2, 2005, the date the court had denied Respondents' first motion for summary judgment, and June 23, 2005, when summary judgment was granted. (App. 126a).

The district court further found that Scott's actions were in bad faith, and that they demonstrated that she had brought her entire claim in bad faith. The court stated that Scott's claim was "legally baseless" because "she knew that she had without authority modified the Board minutes to make them inaccurate." (App. 127a). Citing its inherent authority, the court awarded Respondents their full attorneys' fees, which amounted to over $1,600,000. (App. D, 94-95a). Scott timely appealed both the court's order granting sanctions and its order setting the amount of sanctions. (App. B, 4a).

On appeal, a panel of the Sixth Circuit affirmed all of the lower court's decisions. (App. 60a). The panel held that summary judgment was appropriate because Metro had demonstrated an "honest belief" in two of its stated reasons for terminating Scott: (1) internal complaints about her behavior toward her co-workers and subordinates; and (2) her alteration of the February 7 meeting minutes. (App. 18-20a). The

Sixth Circuit panel did not determine whether Scott had actually behaved poorly in the workplace or whether she had actually committed misconduct by altering the minutes, as it concluded that those issues were irrelevant to the ultimate issue of whether Metro had an "honest belief" in those reasons. (App. 13a).

The panel determined that because of the nature of the complaints by Scott's co-workers and subordinates, Scott could not show that Metro's belief that she was a poor manager was not honest. (App. 14-18a). With respect to the minutes issue, the panel explicitly refused to consider whether Scott's revision of the minutes was inappropriate, or even whether Metro's investigation of that question was sufficient to reach such a conclusion; instead, it concluded that Metro's investigation revealed that Scott's actions were "underhanded," which was a sufficient reason for her termination. (App. 18-20a).

The panel also affirmed all of the sanctions against Scott, adopting the district court's reasoning in full. (App. 57a). Scott's Petition for Rehearing and Suggestion for Hearing En Banc were denied on August 13, 2007. (App. A, 1-2a).

REASONS FOR GRANTING THE PETITION

This case presents two exceptionally important federal questions that have not been resolved by this Court, S. Ct. R. 10(b), and that present a conflict among the Circuit Courts of Appeal, S. Ct. R. 10(a): (1) whether, in a case where a party has not appeared before a court except through the written submissions of her counsel, it violates due process and abuses the

court's discretion to levy $1,600,000 in sanctions that rely on findings that the party has acted with subjective bad faith and that she, not her counsel, is responsible for alleged litigation misconduct; and (2) whether a court may exercise its inherent power to issue sanctions against an individual party in the amount of the opposing parties' entire attorney fees, where the amount of the award is entirely unrelated to the misconduct underlying the sanctions because the party's claim was plainly not frivolous.

These questions are of vital importance, as the Sixth Circuit's decision exposes every participant in the legal system to the possibility of ruinous findings of misconduct, accompanied by massive, grossly disproportionate punishments, without any opportunity to explain their actions, except through the written submissions of the same attorneys who may have caused or counseled alleged litigation abuses. This Court should grant certiorari to resolve the division in the circuits as to these questions, and to emphasize that the inherent power of a court to issue sanctions is subject to the demands of due process, and does not include the power to issue disproportionately punitive sanctions.

I. This Court Should Grant Certiorari to Decide Whether a Court Violates Due Process and Abuses Its Discretion By Failing to Hold a Hearing Prior to Findings That a Party Acted with Subjective Bad Faith and That She, Not Her Attorneys, Was the "Driving Force" Behind Any Violations.

A. The Sixth Circuit Has Created a Conflict Among the Circuits by Affirming the Sanctions Here, Which Were Explicitly Grounded in Mary Scott's Subjective Bad Faith Despite the District Court's Failure to Hold a Single Hearing.

The first question implicated by the Sixth Circuit's decision relates to Scott's right to due process and the district court's exercise of discretion as to its decision to sanction her under its inherent sanctioning powers. Because the court decided all matters related to this litigation without a single hearing, it had no direct contact with Scott and could not observe her demeanor. Its findings rested solely on written submissions, which were not subject to cross-examination. Nevertheless, its sanctions rulings focused on Scott's credibility and subjective bad faith.

The court determined that Scott should be sanctioned, pursuant to Rules 26 and 56, as well as its inherent powers, for withholding the February 7 meeting tapes, and for what it concluded were false statements about those tapes in her summary judgment affidavits. (App. 113-14a). The court did not limit itself to concluding Scott had committed this misconduct, but rather, riddled its opinions with ad

hominem attacks disparaging her character and professional demeanor. (See, e.g., App. G, 164a (mocking Scott's protected activities as "the portrait [she] has painted of herself as the corporate/FCA avenger"); App. 161a (labeling Scott's questioning of her assistant's accounting expertise "dastardly"); App. C, 64a ("[Scott] has not displayed any semblance of self-responsibility or remorse concerning either her wrongful workplace conduct or her wrongful litigation conduct which concealed her wrongful workplace conduct"); App. 76a (claim was filed "to harass and extort" and "long brewed in the liquor of bad faith"); App. 84a n.16 ("[N]o amount of sanction is sufficient to deter [Scott] from future misconduct."); App. 90a ("[Scott's] conduct in this suit has been disreputable and it would be foolish to expect something else in the future."); App. 84a (calling harm to Scott from court's attacks "self-inflicted")).

In the absence of a hearing of any sort, these findings and the corresponding sanctions were an abuse of discretion and a denial of due process. This Court has stated that a court's discretion to assign sanctions pursuant to its inherent power is limited. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991) ("A court must . . . exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees."). Due process requires that, "[l]ike other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980).

Since this Court's pronouncement in *Roadway*, the circuits have diverged greatly in their application of discretionary and constitutional limits to sanctions. Of course, because "[d]ue process is flexible and calls for such procedural protections as the particular situation demands," *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (quotations omitted), it is difficult to state a general rule as to when a hearing is needed. There are, however, certain reliable indicators. For instance, a court cannot ordinarily make credibility findings without a hearing. *Donaldson v. Clark*, 819 F.2d 1551, 1561 (11th Cir. 1987) ("[W]hen a court is asked to resolve an issue of credibility or to determine whether a good faith argument can be made for the legal position taken, the risk of an erroneous imposition of sanctions under limited procedures and the probable value of additional hearing are likely to be greater.").

A hearing is less critical where the sanctioning judge has had a prior opportunity to observe the conduct at issue. *Id.*; *Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118, 1118 n.11 (9th Cir. 2000) (stating that opportunity for written response may "be a perfectly adequate mechanism in many instances for providing counsel with an opportunity to be heard where the judge has effectively witnessed the offenses" (quotations omitted)). Of course, that was not the case here, where the sanctioning judge did not lay eyes on Scott even once during more than two years of litigation.

For similar reasons, until this case, a consensus appeared to have emerged that a court could not find subjective bad faith without first holding a hearing. Even the Sixth Circuit had held that, while a hearing

is not necessary prior to every sanction, e.g., *Wilson-Simmons v. Lake County Sheriff's Dep't*, 207 F.3d 818, 822 (6th Cir. 2000), where, as here, findings are made as to a party's subjective bad faith, a hearing is needed to allow the party to explain her actions. *In re Ruben,* 825 F.2d 977, 985 (6th Cir. 1987). In light of its decision here, the Sixth Circuit's stance now conflicts with the law in other circuits.

Perhaps the clearest conflict is with the Eleventh Circuit, which appears to require a hearing even where only objective bad faith is at issue. See *Amlong & Amlong, P.A. v. Denny's, Inc.*, 2006 WL 4758983, *7-10 (11th Cir. 2007) (stating that "[p]lainly, an attorney threatened with sanctions under [28 U.S.C.] § 1927 is entitled to a hearing," citing *Reynolds v. Roberts*, 207 F.3d 1288, 1302 (11th Cir. 2000), despite holding that subjective bad faith is not prerequisite to sanctions under § 1927).

The Seventh Circuit, in contrast, agrees with the Sixth Circuit's prior position that the touchstone for whether a hearing is necessary is whether the ruling relies on a finding of subjective bad faith. See *Textor v. Bd. of Regents of N. Ill. Univ.*, 711 F.2d 1387, 1395 (7th Cir. 1983) (holding that judge erred in denying hearing on sanctions for abuse of process); cf. *In re Slaughter*, 191 B.R. 135, 142 n.5 (W.D.Wis. Bankr. 1995) (comparing *subjective* bad faith, which requires hearing, with *objective* lack of inquiry prior to filing, which may not).

The Third Circuit's view may be summarized by its holding in *Rogal v. ABC*, 74 F.3d 40 (3d Cir. 1996). In *Rogal*, then-Circuit Judge Alito wrote that due process

required a hearing where a party was accused of making false statements at trial, even though the conduct occurred *in the presence of the sanctioning judge*, to let him "clear up all of the apparent contradictions and inconsistencies in his testimony or to try to show his good faith." *Id.* at 45. While the *Rogal* court explicitly refused to state a general rule for when a hearing is required, *id.* at 44, the requirement of a hearing there, where the record was sufficient to allow a finding of subjective bad faith, *id.* at 45, speaks for itself.

This Court should grant certiorari to resolve this conflict. While this Court need not decide that notice and an opportunity to be heard must mean a full evidentiary hearing prior to any sanction, it must clarify that a court cannot rely on conclusions about a party's subjective state of mind, much less her demeanor or credibility, where she did not have a single opportunity to appear in person before the sanctioning judge. It is one thing for a court to draw objective conclusions from a written record, where questions of motive and credibility are not at issue. It is quite another, and inconsistent with the demands of due process and the limits on judicial discretion, for the court to glean a person's entire character from court documents, no matter how voluminous. Without a hearing, it is difficult for a party to explain complex circumstances, and all but impossible for a party to demonstrate good faith or express remorse after the court has found a violation.

Judging a party's demeanor by her written submissions will also inevitably lead to confusion as to the party's personal role in those submissions. A party

must obviously take responsibility for the facts relied upon in her attorneys' filings, even where the attorneys have, for instance, drafted an affidavit for her review and signature. In contentious cases, though, there is a real danger that the court will mistake the combative tone of the attorneys' rhetoric for the party's own voice. In addition to obscuring even obvious conflicts between them, see *infra*, this will dramatically increase the risk of errors in assigning responsibility for particular decisions, as well as in judging the credibility and good faith of each.

B. The District Court's Finding, Without a Hearing, that Mary Scott Was Solely Responsible for Any Litigation Misconduct Was an Egregious Abuse of Discretion and a Violation of Due Process In Light of the Inherent Conflict Between Scott and Her Counsel.

The insufficiency of the written record for resolution of the issue of sanctions against Scott is especially clear in light of the inherent conflict, ignored by the district court, between Scott and her attorneys. Prior to this case, the Sixth Circuit acknowledged that the demands of due process are especially strong when a party, as opposed to an attorney, is sanctioned. See *In re Ruben*, 825 F.2d at 985 (citing the "inherent problem in a sanction hearing addressed to both a plaintiff and her attorneys, where the plaintiff and attorneys are not separately represented" and reversing sanction against party, despite attorneys' filings on her behalf).

This position has been echoed in other circuits. See *Healey v. Chelsea Resources, Ltd.*, 947 F.2d 611, 623 (2d Cir. 1991) ("A potential for conflict is inherent in a sanctions motion that is directed against both a client and a lawyer, even when, as here, the two agree that an action was fully warranted in fact and law." (citing *In re Ruben, supra*)); *White v. General Motors Corp.*, 908 F.2d 675, 685 (10th Cir. 1990) (noting "obvious conflict of interest" between parties and attorneys as to who should bear responsibility for sanctions).

The Sixth Circuit's departure from this principle is particularly disturbing here, where Scott's attorneys were intimately involved in the actions at issue. Considering the amount of evidence that changed hands during discovery and the parties' conflicting accounts in this case, it was unlikely that written filings would provide a clear answer to the critical question of who had which tapes when. There were serious questions as to when Scott's attorneys acquired the tapes and what degree of control they exercised over the timing of their submission, in light of the following: (1) in March 2005, Scott's attorneys submitted a complete transcript of the February 7 meeting (App. M, 209a n.49), and later stated they had submitted the meeting tapes for review by a sound expert (App. O, 215-16a); (2) during litigation, Scott's attorneys purposely delayed submission of additional tapes located by Scott to await a pending ruling, (App. E, 110-11a); and (3) in opposing sanctions, Scott's attorneys submitted evidence representing that they had possessed and turned over the tapes in July 2004.

(App. N, 211-13a; see also App. L, 203-06a).[1] Given their own potential liability, Scott's attorneys' incentive to resolve this confusion applied only to explanations that would excuse both themselves and their client.

By failing to hold a hearing, the court denied Scott one of her strongest defenses: that her attorneys were responsible, in whole or in part, for any improper conduct that occurred.[2] That this defense was available to Scott was obvious to the district court, which considered the question, albeit briefly, (App. E, 125a, n.12), and to Respondents, who argued Scott and her attorneys could share responsibility, (App. M, 209a n.49), but evidently not to Scott's attorneys, who did not address the issue.

Instead of immediately recognizing the obvious conflict between Scott and her counsel, the court essentially accused Scott's attorneys of fabricating the only evidence they submitted that implicated them and absolved their client. (App. E, 113a (disbelieving affidavit of paralegal indicating tapes were withheld through "innocent copying error")). Without further critical examination of what it appeared to view as an act of perjury, the court adhered to its belief that Scott was "the driving force behind the various disclosure

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[1] Scott's attorneys were also far more responsible than she for any supposed failure to recognize that her claim was frivolous. See *infra* Section II(B)(3).

[2] Due process requires "an opportunity to present every available defense." *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007) (quotations omitted).

problems," and held her attorneys blameless. (App. 125a, n.12).

This Court should grant certiorari to clarify that a hearing was needed to resolve these issues before the court could simply excoriate Scott and excuse her attorneys. Unfortunately, there are many instances in which a party must bear the cost of an attorney's mistakes, but that should not have been the case here, where the courts below should have recognized an obvious conflict of interest. There is simply no question that this glaring conflict would have become clear to the district court through a hearing on the record. As importantly, without such a hearing, there was no basis in the record for resolving the question of whether Scott or her attorneys should bear responsibility. This Court should clarify that where misconduct is alleged against both a party and her attorneys, it is not within the bounds of due process or the court's discretion to decide which of them bears responsibility without conducting proceedings sufficient to provide each with an opportunity to be heard.

C. The Due Process Issue Raised Here Has Not Been Forfeited

Based on previous filings, Scott anticipates that Respondents will argue to this Court that she has forfeited her right to appeal, at least with respect to the due process aspect of this issue, because her attorneys failed to request a hearing and failed to raise on appeal her right to a hearing on due process grounds. This argument is without merit and has no bearing on whether certiorari should be granted.

The issue of Scott's lack of a hearing was brought to the attention of the court of appeals by her brief, wherein she argued it was an abuse of discretion for the district court to have found as it did without an evidentiary hearing. (E.g., App. K, 201-02a). That this question was raised is acknowledged in Respondents' brief, which contains an argument that no evidentiary hearing was required. (App. J, 199-200a). The precise due process argument raised here was addressed at length in the amicus brief of the National Employment Lawyers' Association (NELA). (App. I, 191-98a).

Scott is not aware of any argument by Respondents in their appellate briefs, or any objection to the amicus brief, based on either her failure to request a hearing or her failure to brief this issue. Respondents have thus forfeited any forfeiture argument. See *U.S. v. Quiroz*, 22 F.3d 489, 491 (2d Cir. 1994) (issue of appellant's failure to preserve question can itself be forfeited).

Perhaps as importantly, the issues at stake are such that this Court can and should consider them, even if they were not properly raised below. First, plain error review encompasses cases where "the error seriously affects the fairness, integrity or public reputation of judicial proceedings." E.g., *In re Celotex Corp.*, 124 F.3d 619, 630-31 (4th Cir. 1997) ((citing *U.S. v. Olano*, 507 U.S. 725, 730 (1993)); see also *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) ("Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, . . . or where injustice might otherwise result."

(quotations omitted)); S.Ct. R. 24(a) ("[T]he Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide."). Such issues of fairness are surely evident here, where the necessity for a hearing was clearest *after* the court relied heavily on subjective character and credibility issues in its sanctions ruling. See also *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting) ("Due Process is that which comports with the deepest notions of what is fair and right and just.").

Even if this error did not meet the Court's ordinary plain error standard, the inherent conflict noted above between Scott's interests and those of her trial attorneys, who also represented her before the Sixth Circuit, would excuse her failure to ask for a hearing or raise her due process argument on appeal. Under the circumstances described above, it should have been clear to the district court that Scott was entitled to separate counsel, and that a hearing was needed to distinguish her responsibility from that of her attorneys. For the same reason, the court of appeals should have addressed this issue regardless of how adequately it was briefed. As the Tenth Circuit stated in *White v. General Motors*:

> There is an obvious conflict of interest between [the parties], on the one hand, and their counsel, on the other, on the issue of who should be liable for the sanctions imposed by the district court. The matter was not raised in plaintiffs' briefs; this may have resulted, however, from the very conflict to which we refer. An attorney in the circumstances before

> us who argues that her clients were ignorant of any wrongdoing in the filing of the papers leading to sanctions essentially argues that she should bear sole liability for those sanctions. We therefore raise this . . . issue sua sponte.

908 F.2d at 685; see also *Dunton v. Suffolk County*, 729 F.2d 903, 908 (2d Cir. 1984) (stating that court has duty to call client's attention to attorney's potential conflict).

In addition to excusing any procedural default by Scott, this conflict strengthens the case for plain error review. The prospect of a party who is faced with massive sanctions that could have been assigned in whole or part to her attorneys, but who cannot present the issue to a court because of the actions of those very attorneys, implicates precisely the questions of fairness and the integrity of the courts that plain error review exists to remedy.

II. This Court Should Grant Certiorari to Decide Whether a Court May Exercise Its Inherent Powers to Require a Party to Pay the Entire Amount of the Opposing Party's Attorneys' Fees as a Sanction for Isolated Litigation Misconduct, Where It is Plain that the Party's Action Is Not Frivolous.

A. The Magnitude of the District Court's Sanctions Award Cannot Be Justified Unless Scott's Conduct Demonstrated That Her Claim Was Entirely Frivolous.

While it might have avoided the question altogether if it had granted Scott the opportunity to be heard prior to affirming the sanctions award against her, the Sixth Circuit committed a more obvious and more practically harmful error when it affirmed the magnitude of that award. The district court awarded the entire amount of Respondents' attorneys' fees—over $1,600,000—based on its conclusion, without a hearing, that she withheld the February 7 meeting tapes and made false statements about her withholding of the tapes in her summary judgment affidavits. The massive amount of the award was almost entirely the result of an exercise of the court's "inherent power" to sanction bad-faith litigation conduct; the court's sanctions under the Federal Rules were limited to the attorneys' fees Respondents incurred as a direct result of Scott's alleged misconduct. See App. E, 126a (limiting sanctions

under Rules 26(g) and 56(g) to fees incurred between May 2005 and June 2005).[3]

As the district court's invective-laden opinions indicate, *supra* Section I(A), its sanctions against Scott arose primarily from its view of her as utterly reprehensible. At first glance, it may appear that the court tied its colossal sanctions award to an ostensibly proportional harm by finding that she brought her entire action in bad faith. The court made little effort, however, to support such a conclusion, as it sought to reduce a factually and legally complex lawsuit to a single line of its opinion:

> Plaintiff's conduct in the filing of the suit, when she knew that she had without authority modified the Board minutes to make them inaccurate by including statements not made at the meeting and deleting statements made at the meeting, means that the filing of the suit was not objectively reasonable and was done in bad faith.

(App. 127a). It engaged in no further substantive analysis of whether Scott's claims were frivolous. As explained below, this reasoning does not come close to resolving the question of whether Scott's case had merit. The superficiality of the court's analysis shows that, while the court was aware of the need to justify the magnitude of its sanctions award, it did not attach

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[3] In fact, as more careful analysis would have revealed, even this sanction was not traceable to the alleged misconduct. *Infra* Section II(B)(1).

any serious weight to its statement that Scott's claim was objectively frivolous. Instead, the statement is a token addition to the court's string of subjective assertions as to Scott's character, all of which arise from either her alleged discovery violation or, as discussed below, her pre-litigation conduct.

The district court's decision to sanction Scott for a single act that it decided was conclusive evidence of her bad character, without a logical link between that act and the amount of the award, was contrary to the law of multiple circuits (including, at least in form, the Sixth Circuit) holding that attorneys' fees awarded under a court's inherent sanctioning powers must be proportional to the harm—that is, they "should be limited to those expenses reasonably incurred to meet the other party's groundless, bad faith procedural moves." *In re Ruben*, 825 F.2d at 990 (quoting *Browning Debenture Holders' Comm. v. DASA Corp.*, 560 F.2d 1078, 1088 (2d Cir. 1977)); accord *Klein v. Stahl GMBH & Co. Maschinefabrik*, 185 F.3d 98, 108 (3d Cir. 1999) ("[A] trial court should consider invoking its inherent sanctioning powers only . . . when the sanction is tailored to address the harm identified." (quotations omitted)); see also *Plaintiffs' Baycol Steering Comm. v. Bayer Corp.*, 419 F.3d 794, 808-09 (8th Cir. 2005) (citing cases requiring full protections of criminal contempt proceedings for sanctions not tailored to concrete harm).

The proportionality rule is buttressed by constitutional prohibitions against excessive and arbitrary penalties. By way of analogy, recent decisions of this Court have held that punitive damage awards against tort defendants may not be "grossly

excessive," but instead must bear a "reasonable relationship to the actual and potential harm caused." See, e.g., *Philip Morris USA*, 127 S.Ct. at 1062-63 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-85 (1996)). Surely the inherent powers vested in judges "so as to achieve the orderly and expeditious disposition of cases" are no broader than the power of a jury to assign damages after a full trial. *Chambers*, 501 U.S. at 43 (quotations omitted).

Such an analogy is particularly apt in this case, as another of this Court's most prominent cases on punitive damages, *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408, 421-23 (2003), stated that a defendant could not fairly be punished for legal conduct outside the court's jurisdiction or conduct different from that addressed by the underlying lawsuit. Here, the district court expressly took what it viewed as dishonest or malicious conduct by Mary Scott *during her employment*, and wholly unrelated to her alleged litigation misconduct, into account in concluding that the magnitude of its sanctions was warranted. (App. C, 64a ("In a word, [Scott] has not displayed any semblance of self-responsibility or remorse concerning either her wrongful workplace conduct or her wrongful litigation conduct which concealed her wrongful workplace conduct."); see also App. E, 104-05a (discussing failure to turn over tapes to Metro prior to lawsuit); App. G, 149-51a (drawing adverse inference from consideration of litigation option, under heading "Let's Sue")). The court of appeals plainly endorsed such reasoning. (See App. B, 16a (chiding Scott for failing to apologize for her supposed mistreatment of her employees), 57a (approving reasoning in full)).

The analysis below demonstrates that the district court abused its discretion by issuing grossly excessive and disproportionate sanctions in response to the misconduct alleged against Scott. First, even a cursory review of the lower courts' reasoning reveals that there is no connection between the misconduct at issue and the disposition or duration of the litigation below. Second, in their haste to conclude that Scott's claims were frivolous, the courts below ignored black-letter principles of discrimination law that made their reasoning wholly insufficient even to support summary judgment. Worse, the nature of this reasoning made Scott's claim appear weaker in hindsight, when it was plainly not frivolous at the time it was brought. Finally, the courts failed to consider that even if Scott's lawsuit was objectively frivolous, all or part of the responsibility for realizing that lay not with her, but with her attorneys.

B. Scott's Alleged Misconduct Did Not Make Her Claim Frivolous, So the Courts Below Abused Their Discretion By Issuing Grossly Excessive and Disproportionate Sanctions

1. Scott's Alleged Litigation Misconduct Had No Effect on the Duration or Disposition of the Litigation.

The district court's attorneys' fees award against Scott was premised entirely on her conduct related to the tapes of the February 7 meeting (App. E, 124-28a), which, according to the court, she intentionally withheld, and which would have revealed earlier that she was terminated for wrongfully altering minutes of

that meeting. This assertion is utter nonsense, regardless of whose account of the minutes issue is believed. The court did not need to consider the tape, as Scott's own testimony acknowledged revisions of the minutes; nor were the tapes or minutes conclusive as to the ultimate legal issue.

Scott asserted that the minutes she revised were only a draft, and that she revised them for two purposes: (1) to incorporate by reference the substance of a prior meeting; and (2) to delete reference to a motion she did not second, as the minutes indicated. (App. G, 159-60a). Metro's outside counsel, Jeffrey Fraser, stated that he recommended Scott's suspension and termination based, in part, on his investigation of the minutes issue, and the investigation he described did not require a review of the full tapes. (App. P, 234a (stating that his review involved determining whether minutes had been changed, not whether changed version was substantively accurate)). The contents of the full tapes are relevant to neither account, and if the tapes were in fact withheld, withholding it resulted in no harm at all to Metro.

Indeed, the Sixth Circuit panel acknowledged as much by refusing to even consider the question of whether Scott's revision of the minutes was wrongful. (App. B, 19a (stating that Scott's "attempts to justify her secret alteration of the minutes [were] irrelevant because they do not negate the fact that Metro legitimately perceived her to be untrustworthy because of the alteration.")). The tapes, of course, could neither support nor refute any conclusion as to Respondents' subjective beliefs.

This means that, even absent the hearing that was necessary to determine whether the tapes were withheld, who was responsible for withholding them, and whether there was a legitimate explanation for their late production, the district court should have realized that it did not need the tapes to reach the conclusion it did on summary judgment and that having the tapes provided no meaningful support for Metro's substantive claims. In short, not only were the court's sanctions not "tailored to address the harm identified," *Klein*, 185 F.3d at 108, they were not logically related to the identified misconduct in any way. See *Hudson v. United States*, 522 U.S. 93, 103 (1997) (noting constitutional protections against "downright irrational" sanctions).

2. The Lower Courts' Reasoning As to Why Scott's Claim Was Frivolous Ignored Established Principles of Discrimination Law.

a. The Sixth Circuit's Application of Its "Honest Belief" Standard Deprived Scott of Any Opportunity to Prove Her Claim

The courts below also failed to tie their sanctions to any legitimate reasoning as to why her claims lacked objective merit. In fact, the granting of summary judgment against Scott disregarded precedent from this Court and others.

First, both courts held that Scott could not show that Metro did not have an "honest belief" in its two stated reasons for its adverse employment actions

against her: (1) her co-workers' and subordinates complaints about her inappropriate behavior; and (2) her wrongful alteration of the February 7 minutes. While the courts below paid lip service to the requirement that an employer's "honest belief" must be based on "reasonable reliance on the particularized facts that were before the employer when the decision was made" and make "a reasonably informed and considered decision before taking adverse action," (App. 7a, 179a (quotations omitted)), they refused to consider evidence that: (1) Scott's fellow employees' complaints against her were false, (App. 13a, 146a); (2) no such complaints appeared in her personnel file, and her personnel file was "squeaky clean" prior to her Summer 2001 reports of fraud to Faas, (App. 164-65a); (3) the complaints arose from a survey of her performance approved by Faas soon after these reports, (App. 143a); or (4) this survey was profoundly flawed. (App. 144-47a). All of this evidence was relevant to the "particularized facts" upon which Metro relied; taken together, it was sufficient to show that reliance on these facts was reasonable.

The courts below also ignored Scott's evidence that Fraser, Metro's primary investigator, was clearly biased against her, rendering any investigation suspect, and conducted virtually no investigation of the minutes issue. (See App. P, 223-25a (deposition testimony of Fraser admitting he did not ask Scott for explanation prior to suspension), 232a (admitting he had too little compliance knowledge to judge whether minutes revisions were accurate)); 233-38a (referencing App. R, 246-65a (post-suspension memo showing Fraser's notes dismissing Scott's explanations as "crap" (253a, 256a) and "nonsense" (248a, 250a) and

stating she "complained all the time" (248a))). In fact, the panel refused to consider whether Fraser's investigation was even sufficient to reach a conclusion about whether she committed misconduct by revising the draft minutes, stating, "Even assuming arguendo that Scott's alterations accurately reflected what happened at the meeting, that would not change the underhanded nature of what she did." (App. B, 19a).

This reasoning essentially deprived Scott of any opportunity to present circumstantial evidence rebutting Metro's "honest belief." Because her challenges to both the underlying facts and Metro's investigation were ignored, Scott could only have rebutted Metro's "honest belief" if Fraser or the Board had admitted they did not believe their stated reasons.[4] This was an egregious violation of the applicable standard of review, as the court relied heavily on the credibility of Fraser—a biased, interested witness—and refused to make any inferences in Scott's favor. See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000) (stating that in reviewing a Rule 50 or Rule 56 motion, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence," and may rely only on "that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." (quotations omitted)).

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[4] Metro's "honest belief" could also have been rebutted through Scott's other evidence of pretext, discussed *infra*, Section 2(b).

b. The Sixth Circuit Ignored the Questions of Whether Metro Was Actually or Wholly Motivated By Its Proffered Reasons for Scott's Termination

Even if Scott had admitted that she had falsified the February 7 minutes and that the Board honestly believed she had, she could still have brought a good-faith retaliation claim, and that claim could still have survived summary judgment. See, e.g., *Mihalik v. Pro Arts, Inc.*, 851 F.2d 790, 794 (6th Cir. 1988) ("It is not per se unreasonable to initiate a law suit and pursue a possible claim where the defendant may have a strong defense."). That the conduct Defendants cited as the reason for Scott's termination may actually have occurred does not mean it was the real reason she was discharged. See *Harding v. Careerbuilder, LLC*, 168 Fed. Appx. 535, 538 (3d Cir. 2006) (stating that to show pretext, "the plaintiff can put on evidence '(1) that the proffered reasons had no basis in fact, (2) that *the proffered reasons did not actually motivate his discharge*, or (3) that they were insufficient to motivate discharge.'" (quoting *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 513 (7th Cir. 1993)) (emphasis added)); accord *Manzer v. Diamond Shamrock Chem. Co.*, 29 F.3d 1078, 1084 (6th Cir.1994). While the Sixth Circuit ignored this possibility here, other circuits' holdings indicate that the surrounding circumstances were sufficient to support Scott's retaliation claim regardless of whether she committed misconduct.

First, it was reasonable for Scott to believe the minutes issue was not the real reason for Metro's

actions not only because it was untrue, but also based on the timing of her suspension and termination. Scott was suspended within weeks of what the lower courts deemed Metro's first effective notice of her protected activities. (App. G, 151a (reporting fraud); 163a (suspension)). At least one circuit has held that such suspicious timing alone may be enough to survive summary judgment, "even in the face of alternative reasons proffered by the defendant." *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 507 (9th Cir. 2000); see also *Plotke v. White*, 405 F.3d 1092, 1105 (10th Cir. 2005) ("The timing and sequence of events leading up to [the employee's] firing are also evidence of pretext."); *Little v. BP Exploration & Oil Co.*, 265 F.3d 357, 363-64 (6th Cir. 2001) (stating that while timing alone is not sufficient to establish pretext, it is evidence of pretext).

Second, the fact that Metro originally stated a different, purportedly "neutral" reason for her termination, citing a "management reorganization," (App. 164a), undermines the explanations they later proffered to the court. See, e.g., *Young v. Warner-Jenkinson Co.*, 152 F.3d 1018, 1023 (8th Cir. 1998) (stating that change in explanation is evidence of pretext); *Sheridan v. DuPont*, 100 F.3d 1061, 1069 (3d Cir. 1996) ("Resort to a pretextual explanation is, like flight from a scene of the crime, evidence of consciousness of guilt, which is, of course, evidence of illegal conduct." (quotations omitted)).

Perhaps most importantly, Scott was justified in comparing her own termination, purportedly based on an act of deception or fraud, to that of other employees who were not disciplined at all, despite their

complicity in millions of dollars of fraud against the federal government. See, e.g., *Green v. New Mexico*, 420 F.3d 1189, 1194 (10th Cir. 2005) ("[A] plaintiff may show pretext by providing evidence that he was treated differently from other similarly situated, nonprotected employees who violated work rules of comparable seriousness." (quotations omitted)); accord *Buie v. Quad/Graphics, Inc.*, 366 F.3d 496, 508 (7th Cir. 2004). For instance, Faas, who reported to Metro's Board, like Scott did at the time of her termination, (App. B, 10a, n.1), was not disciplined. See *Buie*, 366 F.3d at 508 (emphasizing importance of showing same supervisor made disparate decisions).

The district court and the panel also ignored the fundamental principle, propounded by this Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and followed by the circuit courts in retaliation cases, that even if the minutes issue was *a* reason for the discharge, impermissible considerations could also have been a motivating factor, under a mixed-motive discrimination theory. This theory of liability has been applied repeatedly in retaliation cases, e.g., *Gibson v. City of Louisville*, 336 F.3d 511, 513 (6th Cir. 2003) ("[M]ixed-motive analysis permits a finding of liability where the employer is motivated by both unlawful considerations and legitimate reasons."); *Norbeck v. Basin Elect. Power Coop.*, 215 F.3d 848, 850-51 (8th Cir. 2000) (employers are liable for actions motivated at least *in part* by retaliatory animus), and it applies regardless of whether the employee is able to proffer direct evidence of impermissible motives. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99-102 (2003).

A court's finding that an employee committed some misconduct is not enough under any of the above-cited circumstances, as additional evidence suggests the misconduct was not the reason—or the whole reason—for the employer's actions. Despite these clear, long-standing principles, the analysis used by the courts below ended after the determination that Metro had an honest belief that the reasons it proffered were based in fact. Both courts concluded, incorrectly, that if Scott knew she had committed workplace misconduct, she also knew she was not retaliated against. The sanctions that resulted from this spurious reasoning must be rejected by this Court to preserve the bedrock principles of discrimination law flouted by the courts below.

3. Even Under the Lower Courts' Flawed Analysis, Scott's Claims Could Only Be Viewed as Frivolous with the Benefit of Hindsight and Legal Expertise, Neither of Which Scott Possessed When She Initiated Her Retaliation Claim.

Even assuming summary judgment against Scott was appropriate and her claims were properly defeated by the conclusion that Metro honestly believed in the truth of its stated reasons, the Sixth Circuit committed a grievous error when it improperly relied on the benefit of hindsight to conclude that Scott's claims were entirely frivolous and brought in bad faith. Equally important—and inextricably entwined with the due process violation cited above—the lower courts failed to acknowledge the responsibility of Scott's attorneys for avoiding a frivolous claim, when her

claim failed only because of technical legal conclusions no non-attorney could have foreseen.

First, Scott's good-faith basis for her claim relied not only on her retaliatory discharge, but also on allegations of retaliatory acts preceding it, and thus, preceding any workplace misconduct. The district court did not consider these acts because it held they had occurred prior to Defendants' notice of Scott's protected activities, based on its ruling that Scott's prior activities were not protected because they were part of her compliance duties for Metro. (App. G, 180a). Scott vigorously disputed Respondents' arguments as to her compliance duties and the nature of her initial complaints. The conclusion that these complaints were not protected activities was complex and dependent on the particulars of the case. (See, e.g., App. 138-39a, 164-69a, 174-78a, 180a (describing Scott's compliance duties and reports of fraud and citing, at length, *Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 567-68 (6th Cir. 2003) (analyzing whistleblower's duties and reports in detail before holding notice insufficient)).

Both lower courts should have recognized that the failure of this argument was not foreseeable at the outset of litigation. With the benefit of hindsight, the district court and the Sixth Circuit panel focused unduly on the purported frivolousness of Scott's wrongful discharge claim, without acknowledging her good-faith allegations about prior retaliatory acts, such as the undermining of her supervisory authority, which were causally linked to her eventual termination. An additional effect of this determination was to make these initial acts, which naturally

appeared retaliatory to Scott, seem to the courts below entirely innocent and unrelated to her ensuing termination. The panel even cited the timing of the internal complaints against Scott, which arose just after she first reported fraud to Faas, as a reason for believing those complaints were *not* retaliatory. (App. B, 17a). Setting aside the disturbing logical gaps in such reasoning, it was inappropriate to rely on hindsight to determine whether Scott's claims were frivolous, as courts have frequently acknowledged. As this Court stated in *Christiansburg Garment Company v. EEOC*:

> [I]t is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success.

434 U.S. 412, 421-422 (1978); see also *Salkil v. Mt. Sterling Twp. Police Dep't*, 458 F.3d 520, 530 (6th Cir. 2006) (reasonableness of conduct must be examined as of time of filing); accord *Sheets v. Yamaha Motors Corp., U.S.A.*, 891 F.2d 533, 536 (5th Cir. 1990); *Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1181-82 (11th Cir. 2005). Instead, all of the evidence supporting Scott's claims should have been considered, especially evidence of retaliation predating the subject matter affected by her alleged discovery violations, given that the sanctions at issue were premised on those violations.

Similarly, even if the Sixth Circuit was correct to apply its "honest belief" standard to exclude consideration of any evidence as to the falsity of the internal complaints against Scott, the shoddiness of Metro's investigation of her, and nearly every other piece of circumstantial evidence she proffered, it should have considered this evidence in determining whether Scott's action was frivolous. By holding that her action was entirely frivolous based on its conclusions as to Metro's beliefs, the court held Scott responsible for her failure to take Metro's purported "honest belief" at face value, when it differed from the contemporaneous reason stated for her termination, and she knew that the internal complaints were false, that Metro had made little effort to get to the bottom of the minutes issue, and that no one was disciplined for the fraudulent acts she identified. Even assuming the court's determination was correct, it was hardly a foregone conclusion at the time Scott brought her action. As then-Circuit Judge Roberts wrote in *Taucher v. Brown-Hruska*,

> [T]here is always the hope that, after decision, the "wrong view" looks considerably less plausible than it did before. But just as discovery of contraband does not establish probable cause, nor an accident negligence, nor poor returns an imprudent trustee, so too a loss on the merits does not mean that legal arguments advanced in the context of our adversary system were unreasonable.

396 F.3d 1168, 1173 (D.C. Cir. 2005).

If these two critical rulings *were* foreseeable, the responsibility for foreseeing them lay solely with Scott's attorneys, as a fair hearing would have demonstrated. The decisions here unfairly held Scott responsible not only for acting in good faith and relying on her knowledge of the relevant facts, but also for understanding the technical concepts of "effective notice of protected activity" and the "honest belief standard," as well as the application of those concepts to her claim. See, e.g., *Borowski v. DePuy, Inc.*, 850 F.2d 297, 305 (7th Cir. 1988) (stating that "courts generally impose sanctions entirely on counsel when the attorney has failed to research the law"); *Satterlee v. Northside Developers, Inc.*, 216 F.R.D. 330, 336 (D.V.I. 2007) ("[T]he assertion of legal principles and matters of the law fall solely within the duty of the attorney."); *Blake v. National Cas. Co.*, 607 F.Supp. 189 (C.D.Cal. 1984) ("While an attorney may have to rely upon his client for facts, knowledge and interpretation of the appropriate law is his specialty, and for which he has been specially trained. As a consequence, the attorney and not the client should bear the sanction [for legally baseless filings]"); but see *Nick v. Morgan's Foods, Inc.*, 270 F.3d 590, 596 (8th Cir. 2001) ("It is of no consequence when the abuses [underlying sanctions against a party] are perpetrated by counsel, rather than the client.").

It was Scott's attorneys, if anyone, who should have realized that Metro's actions prior to Scott's formal report to the Board might fall outside the scope of the FCA, and that her claim might fail even if she proved conclusively that her termination was based on false complaints against her and an incomplete investigation of her alleged workplace misconduct.

Scott does not have an attorney's expertise, and she should not be punished for bringing a claim that could be viewed as potentially frivolous only through the lens of that expertise.

This Court should grant certiorari, not only to rectify the outrageous injustice visited upon Scott through the sanctions at issue, but also to prevent the Sixth Circuit's divergence in this case from creating uncertainty as to established discrimination law doctrines and the principles of fundamental fairness underlying the vesting of courts' inherent sanctioning powers. Without this Court's intervention, all parties bringing federal lawsuits will do so under the threat of arbitrary, grossly disproportionate sanctions, regardless of their subjective good faith or attentiveness to the objective requirements of the law.

Worse, this threat arises from an unquestionably meritorious *qui tam* action that resulted in a substantial recovery by the government. With respect to the FCA and every other federal statute forbidding discrimination or retaliation, denying certiorari here will deter meritorious actions and ensure that fraud and lawlessness remain hidden. Dissenting in *Chambers*, Justice Kennedy warned that the "standardless exercise of judicial power . . . can be applied to chill the advocacy of litigants attempting to vindicate . . . important federal rights." 501 U.S. at 68. This case presents just such a standardless exercise of power, affording this Court an opportunity to demonstrate that there *are* limits to the courts' inherent sanctioning powers.

CONCLUSION

For all of the reasons set forth above, Petitioner Mary Scott respectfully submits that her petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-1948/2642, No. 06-1122/1652

[Filed August 13, 2007]

MARY SCOTT,	)
Plaintiff- Appellant,	)
	)
v.	)
	)
METROPOLITAN HEALTH CORPORATION, DOING BUSINESS AS METROPOLITAN HOSPITAL, A MICHIGAN CORPORATION, ET AL.,	)
Defendants-Appellant-Appellees.	)

BEFORE: GUY, SUHRHEINRICH, and GRIFFIN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied. Judge Guy would grant rehearing for the limited purpose of amending the opinion to provide for a remand for an evidentiary hearing concerning the award of sanctions under the court's inherent authority.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-1948, No. 05-2642, No. 06-1122, No. 06-1652

[Filed April 3, 2007]

MARY SCOTT,
Plaintiff- Appellant,

v.

METROPOLITAN HEALTH CORPORATION,
d/b/a METROPOLITAN HOSPITAL,
a Michigan corporation,

and

MICHAEL FAAS,
an individual, jointly and severally,
Defendants-Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

BEFORE: GUY, SUHRHEINRICH, and GRIFFIN, Circuit Judges.

GRIFFIN, Circuit Judge.

Plaintiff Mary Scott timely appeals five orders of the district court: the grant of summary judgment; the imposition of sanctions; the calculation of the amount of sanctions; the district judge's refusal to recuse himself; and the refusal to reconsider the recusal ruling. For the reasons that follow, we affirm the orders of the district court.

I.

The district court had jurisdiction over Scott's discharge claim pursuant to the general federal question statute, 28 U.S.C. § 1331, and venue was proper in the Western District of Michigan under the FCA, 31 U.S.C. § 3732(a). We have jurisdiction pursuant to 28 U.S.C. § 1291.

II.

We review the entry of summary judgment de novo. *Brainard* v. *Am. Skandia Life Assur. Corp.*, 432 F.3d 655, 660 (6th Cir. 2005). Summary judgment is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Moross Ltd. P'ship v. Fleckenstein Capital, Inc.*, 466 F.3d 508, 515 (6th Cir. 2006) (citing FED. R. CIV. P. 56(c)). We construe the evidence in the light most favorable to the non-movant and draw all reasonable inferences in her favor. *Id.* The central issue is whether the evidence presents sufficient disagreement

to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Id.* "The mere existence of a scintilla of evidence in support of [non-movant]'s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.*

In imposing sanctions against Scott, the district court invoked Rules 26(g) and 56(g) and the court's inherent authority. We review both a decision to impose sanctions and the determination of the amount of sanctions for abuse of discretion. *Jordan* v. *City of Cleveland,* 464 F.3d 584, 600 (6th Cir. 2006); *First Bank of Marietta v. Hartford Underwriters Ins. Co.,* 307 F.3d 501 (6th Cir. 2002). We will find an abuse of discretion only if the district court "based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 405 (1990); *Salkil v. Mt. Sterling Twp. Police Dep't,* 458 F.3d 520, 527-28 (6th Cir. 2006). We will find an abuse of discretion only when we are left with "the definite and firm conviction that the court below committed a clear error of judgment . . . ." *Sako v. Gonzales*, 434 F.3d 857, 863 (6th Cir. 2006).

Finally, we review the judge's refusal to recuse himself for abuse of discretion. *United States v. Jamieson*, 427 F.3d 394, 405 (6th Cir. 2005), *cert. denied*, — U.S. —, 126 S. Ct. 2909 (2006). We likewise apply abuse-of-discretion review to the district court's denial of Scott's motion to reconsider the recusal decision. *United States v. Brown*, 449 F.3d 741, 750 (6th Cir. 2006).

III.

Scott asserts a claim under 31 U.S.C. § 3730(h), which provides, in pertinent part,

> Any employee who is discharged . . . or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.

The familiar *McDonnell-Douglas* burden-shifting framework applies to retaliation claims. To establish a prima facie case of retaliation, Scott had to show that (1) she engaged in protected activity, (2) defendant Metropolitan Health Corporation ("Metro") knew of this exercise of her protected rights, (3) Metro took an employment action adverse to her, and (4) there was a causal connection between the protected activity and the adverse action. *Balmer v. HCA, Inc.*, 423 F.3d 606, 613-14 (6th Cir. 2005).

If Scott establishes a prima facie case of retaliation, a presumption of retaliation arises; Metro may rebut that presumption by asserting a legitimate, non-retaliatory reason for the adverse actions. *Balmer*, 423 F.3d at 614. The burden then shifts back to Scott to show by a preponderance of the evidence that Metro's stated lawful reason was a pretext for retaliation. *Id.* Scott must then produce sufficient

evidence from which a jury could reasonably reject Metro's explanation and infer that Metro intentionally discriminated against her because of protected activity. *Id.*

To show pretext, Scott "must submit evidence demonstrating that the employer did not 'honestly believe' in the proffered non-discriminatory reason for its adverse employment action." *Id.* To inquire into the defendant's honest belief, the court looks to whether the employer can establish "reasonable reliance" on the particularized facts that were before the employer when the decision was made. *Id.* The key inquiry is whether the employer made a reasonably informed and considered decision before taking adverse action. *Id.*

As this court recently stated:

> If there is no reasonable dispute that the employer made a "reasonably informed and considered decision" that demonstrates an "honest belief" in the proffered reason for the adverse employment action, the case should be dismissed since no reasonable juror could find that the employer's adverse employment action was pretextual.

Id. Likewise, the Supreme Court has held that there are cases where a defendant is entitled to summary judgment, despite the plaintiffs success in making out a prima facie case:

> [A] plaintiffs prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the

> trier of fact to conclude that the employer unlawfully discriminated.
>
> This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability. *Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision*, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148 (2000) (emphasis added).

In determining whether Scott made out a prima facie case, the district court considered whether Metro's Board had sufficient notice of Scott's protected activity when it terminated her in January 2003. First, the district court had to decide what is required, as a matter of law, to place an employer on sufficient notice of FCA protected activity in such a situation. The court held that Scott had to give heightened notice to Metro because her responsibilities included legal compliance. The court then considered each instance of alleged protected activity proffered by Scott and found that

none was sufficient to give Metro the requisite notice. The court refused to consider Scott's claim that she met with Faas in secret to express concerns about possibly illegal vascular-study compensation, because that claim contradicted her deposition testimony. The court determined that Scott did not give adequate notice of her possible intent to bring an FCA *qui tam* action until April 2002, when Scott reacted to notice of her reassignment by going to the Executive Committee with compliance issues. The court reasoned, "on Scott's own theory, Faas had already determined to terminate her before April 2002," so Faas's initial decision to terminate could not have been motivated by a desire to retaliate for FCA protected activity. *See United States v. Metro. Health Corp.*, 375 F. Supp. 2d 626,646 (W.D. Mich. 2005).

The district court concluded its analysis of Scott's prima facie case by noting the implications of the undisputed fact that Faas was replaced as her superior and decisionmaker as soon as she raised compliance issues on April 17,2002. The district court reasoned:

> Furthermore, there is an even more basic causal problem for Scott's theory of liability. The causal chain between the "protected activity" and discharge was broken asunder when she brought her protected activity to the attention of [Metro's outside employment-law counsel Jeff] Fraser in April 2002. This act saved her from termination by Faas [because it caused the Board to rescind her just-announced reassignment to the dead-end, temporary

> Borgess project] and essentially[1] gave her new supervisors - the Board and Fraser.

United States v. Metro. Health Corp., 375 F. Supp. 2d 626, 646 (W.D. Mich. 2005).

The court concluded by stating that, even if Scott could make out a prima facie case, defendants are entitled to summary judgment. Even putting aside all other complaints about Scott's conduct, Metro indisputably knew, before it terminated her, that she surreptitiously altered board minutes and presented them as the true minutes. The court also determined that Scott had not shown a genuine issue as to whether the board terminated her because it honestly believed the complaints:

> Plaintiff has admitted facts which establish beyond any genuine issue of material fact that she wrongly altered corporate records . . . .[2]

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[1] The district court should not have said that Scott "essentially" got new supervisors in April 2002; she *literally* and *entirely* got new supervisors. Scott has not disputed that from mid-April onward, she reported not to Faas but only to the Board and Fraser.

[2] The district court also stated that Scott "withheld from the corporation tapes evidencing corporate minutes." *United States v. Metro. Health Corp.*, 375 F. Supp. 2d 626, 646 (W.D. Mich. 2005). However, unlike the alteration of the minutes, Scott did *not* expressly admit withholding the tapes.

> Finally. . . Plaintiff also fails to make a showing to establish that the [stated] reasons for termination were pretextual. In this case, the decision makers were the Board and Fraser, independent of Faas. *There is no evidence raising a serious doubt that the Board [had] a "reasonable belief" as to the manifold reasons for discharging Plaintiff — i.e., . . . insubordination as to Fraser, refusal to obey the protocol, inappropriate conduct as to management assessment [the OCI evaluations], verbal abuse of colleagues, efforts to manipulate management assessments, disparaging fellow officers [in front of her subordinates], and threatening to retaliate against staff to name a few reasons.* This is a mountain not a mole hill.

United States v. Metro. Health Corp., 375 F. Supp. 2d 626, 646, 647 (W.D. Mich. 2005) (emphasis added).

Metro points out that as soon as Scott made her compliance and employment complaints to the Executive Committee (in meetings on April 19, 20, and 22, 2002), it rescinded Scott's planned reassignment and hired law firms to investigate her allegations. Both firms reported to the Board that Scott had interfered with their investigations by creating and submitting false evidence (the doctored minutes), hiding evidence (the tapes), and attempting to influence or intimidate her staff away from honestly cooperating with the investigation. In addition, the Board had numerous reports of Scott's bizarre, disruptive, distracting, rude, threatening, and unprofessional conduct towards superiors, fellow managers, and staff. Thus, Metro contends that there

is no genuine issue that the Board honestly believed that these reports were true and that they warranted Scott's termination.

On April 17, CPO Sefton told Scott that Metro was going to change her role so that she would have no direct reports and would manage only the Borgess relationship. However, the reassignment never took place. Scott immediately contacted her lawyer and Fraser, who scheduled meetings for the 19th, 20th, and 22nd before the Executive Committee. That same day, as soon as Fraser told Faas about Scott's presentation of compliance and employment law concerns to the Executive Committee, Faas rescinded the planned reassignment.

It is undisputed that Metro never implemented the reassignment. Accordingly, Scott suffered no tangible harm as a result of the immediately-rescinded reassignment announcement. The law in our circuit is that actions that are not implemented are not adverse employment actions. *See Mitchell v. Vanderbilt Univ.*, 389 F.3d 177, 182 (6th Cir. 2004) ("Graham's proposals to reduce Mitchell's pay, alter his employment status, and reassign him . . . were never implemented and therefore not adverse employment actions.").

About two months after the aborted reassignment, Metro placed Scott on paid leave pending investigation. In our circuit, "'a suspension *with* pay and full benefits pending a timely investigation into suspected wrongdoing is not an adverse employment action.'" *Peltier v. United States*, 388 F.3d 984, 988 (6th Cir. 2004) (quoting *White v. Burlington No. & Santa Fe*

Ry. Co., 364 F.3d 789, 803 (6th Cir. 2004) (en banc), *aff'd o.g.*, — U.S. —, 126 S. Ct. 2405 (2006)).

Because the unimplemented April 2002 reassignment and the June 2002 paid leave were not materially adverse actions, they cannot serve as the basis for an FCA retaliation claim. That leaves only one materially adverse action: Scott's termination in January 2003.

Even assuming *arguendo* that Scott could make out a prima facie case of FCA retaliation with regard to her January 2003 termination, Metro was still entitled to summary judgment because Metro's stated reasons for the termination were not pretexts for FCA retaliation. Scott fails to show a reasonable dispute as to whether Metro made a "reasonably informed and considered decision" that demonstrates an "honest belief' in the proffered reasons.

On summary judgment, the question is not whether the complaints about Scott were "true" or made in good faith. Likewise, the question is not whether Scott's asserted reasons for altering the minutes are sincere, credible, or legitimate. The question is whether Scott has established a genuine issue as to whether Metro *honestly believed* that the complaints were true and warranted her termination. Scott has not done so. *Cf. Balmer*, 423 F.3d at 615 (affirming summary judgment for employer on retaliation claim and stating, "Even if a genuine issue of material fact remains as to whether Plaintiff improperly used HCI's funds to pay for personal legal research, Plaintiff has put forth no evidence suggesting that [the person] who ultimately made the decision to end Plaintiffs employment, did

not 'honestly believe' that Plaintiff had misused HCI's funds.").

It cannot be said that Metro's decision to terminate Scott was not "reasonably informed and considered." First, Metro did not reach that decision early on in Scott's employment, without giving her an opportunity to acclimate to the organization and develop a record and reputation. For instance, if Scott had started working for Metro in 2000 or 2001 and started raising compliance concerns immediately or shortly thereafter, a reasonable jury might suspect that Metro took umbrage at her FCA protected activity and thus decided not to give her a chance. Scott began working for Metro around January 1, 1998, and even her version of events alleges that Faas did not decide to terminate her until over four years later, shortly before the aborted April 2002 reassignment. After the Executive Committee and Fraser replaced Faas as Scott's direct superior in April 2002, the committee did not decide to terminate Scott until sometime late in 2002.

Second, Metro's decision to terminate Scott was supported by widespread complaints about Scott's conduct. If Metro had terminated Scott after receiving only one or two complaints, one might argue that the complaints stemmed merely from the kind of routine personality clashes and everyday disagreements that can develop in the workplace, even when the participants are not unstable, uncooperative, or belligerent — just a person or two whom Scott "rubbed the wrong way" and vice versa. In that situation, a reasonable jury might believe that Metro was seizing upon the first complaints to come along as convenient

pretexts to get rid of her and stop her compliance complaints. But here, it is undisputed that Metro received complaints from a large and diverse group of people over a period of years. There is no basis for Scott's assertion that Metro had to dig through "five years of performance, thousands of e-mails, reports, interactions, etc. in order to extract *only a handful* of 'negative' interactions . . . ."

Third, Metro does not justify its decision to terminate Scott only by reference to complaints that came from other senior managers. If Metro had done so, a reasonable jury might conclude that the complaints were merely the result of the "turf wars" that can occur between officers who have substantial authority within a corporation and compete with each other for influence and a wide portfolio of job duties. Examples might be the allegations that Scott attempted to undermine CFO Smedes and prevent him from assuming powers that she believed should be her own; or that Scott infringed on the role of Christine Lawrence with respect to the sexual harassment matter at one of Metro's off-campus clinics. But, it is undisputed that Metro received complaints from people who were not fellow managers and therefore Scott's direct potential rivals.

Fourth, Metro does not justify its decision to terminate Scott based only on complaints from her subordinates, particularly subordinates who Scott could show had poor work records or were eventually fired or encouraged to leave Metro. If those were the only complaints Metro received, a reasonable jury might conclude that Metro did not honestly believe the problem was Scott rather than the underperforming

employees. In other words, a jury might conclude that Metro knew the complainers simply resented Scott for requiring them to work hard, giving them negative evaluations, or recommending action against them based on their performance or attitude. Rather, it is undisputed that Metro received complaints from people who were never Scott's subordinates.

Fifth, Metro had no reason to believe that any of the grounds for terminating her were improving. As to Scott's alleged conflicts with coworkers and mistreatment of subordinates, Scott presents no evidence that the complaints tapered off in number or severity. Nor does she allege that she tried to address the gravamen of the complaints and change how she came across to a wide range of colleagues and subordinates — rather than merely attacking the complainants.

With regard to Scott's admitted alteration of the minutes, there is no evidence that she ever apologized and began to behave ethically and cooperate with her superiors and with Metro's counsel. Instead, Metro had reason to believe that Scott continued to engage in unethical and untrustworthy conduct: in June and July 2002, she first claimed not to have any tapes of the Board meeting, then "found" one tape, then produced that tape with a portion apparently erased (the very portion that would have matched the original minutes and contradicted her alterations).

Metro also had reason to believe that Scott continued to be uncooperative and disobedient: after signing the April 29, 2002, agreement promising to keep the situation confidential, she told subordinates

that she was no longer reporting to Faas. After attorneys Fraser and Valiant repeatedly instructed Scott not to gather documents that were not in her possession (and not to have her staff do so), Scott's subordinates reported that she continued to do so anyway.

In summary, Metro had good reason to believe that Scott showed no signs of ceasing her objectionable behavior.

Sixth, and significant for a retaliation case, Metro did not claim to have received complaints about Scott only *after* she went to the Executive Committee with her compliance complaints in April 2002. If Metro had done so, a reasonable jury might suspect that the complaints were not legitimate in the sense of being independently made by the complaining parties. In other words, a jury might conclude from the timing of the complaints that Metro had encouraged such complaints in order to build a case for firing Scott, when its real motive was to retaliate for her FCA activity. But it is undisputed that Metro received complaints about Scott long before she went to the committee in April 2002.

Seventh, and perhaps most significant, Metro did not merely accept complaints about Scott at face value without taking the time to let events unfold and give Scott a fair chance. By waiting as long as it did to terminate Scott, Metro took the time to see whether the complaints evinced a pattern of behavior by Scott that it could not tolerate. On this extreme and voluminous record, Metro can honestly say that it acted only after pressed to do so by the sheer number

of complaints, the length of time and different contexts covered by the complaints, and the diversity of sources for the complaints. Moreover, Fraser interviewed Scott's subordinates in April-May 2002 — and Scott cannot deny that Fraser did so, nor complain that Metro deliberately chose interviewees whom it knew disliked Scott, because *Scott herself* urged Fraser to meet with her subordinates and even identified the people with whom she wanted him to speak. Thus, it is untenable for Scott to charge that Metro "merely rubber-stamped" the complaints with "no independent investigation" of its own.

So far we have focused on the complaints against Scott and her relationship with her superiors, peers, and subordinates. This is appropriate, because such evidence constitutes so much of the enormous record in this case and Scott cannot convince a reasonable jury that Metro did not believe that the complaints were true and serious enough to warrant her termination. But there is another, independent reason to affirm summary judgment. Scott cannot convince a reasonable jury that Metro did not believe that she secretly altered the minutes of a Board meeting, withheld tapes of that meeting, and disobeyed repeated instruction to stop gathering documents not in her possession — and that such conduct warranted termination as well.

Finally, in an attempt to show that her termination was not a "reasonably informed and considered" decision (which Metro needs for its "honest belief" defense), Scott complains that the Board should have investigated her alteration of the minutes. This contention is untenable to the point of absurdity.

Under the unusual circumstances of this case, further "investigation" into Scott's alteration of the minutes was unnecessary and pointless.

Scott expressly admitted that she secretly altered the corporate minutes. That alone was sufficient to warrant Scott's discharge. Scott did not contact her superiors or other participants in the meeting to express her view that Wiest's minutes needed to be corrected. If she had done so and the Board cited her proposal to revise the minutes as a reason for termination without investigating, Metro might not have an "honest belief' defense to pretext.

But Scott did not proceed in an honest, ethical fashion with regard to the minutes. Rather, she *unilaterally and by stealth* altered the minutes and got caught trying to pass off her version as the original by "returning" the altered version to her secretary, Wiest, and by presenting the altered version to Metro's outside counsel without acknowledging the unauthorized alterations. Even assuming arguendo that Scott's alterations accurately reflected what happened at the meeting, that would not change the underhanded nature of what she did.

Scott's attempts to justify her secret alteration of the minutes is irrelevant because they do not negate the fact that Metro legitimately perceived her to be untrustworthy because of the alteration.

In short, Metro formed an honest belief in the complaints against Scott, which were sufficiently corroborated and investigated, and it did not need to investigate her admitted unauthorized alteration of

the minutes. *See Smith v. Chrysler*, 155 F.3d 799, 807 (6th Cir. 1998). Therefore, there is no genuine issue that the committee's decision to terminate Scott was a reasonably informed and considered one, and Scott cannot prove pretext to a reasonable factfinder. This entitles Metro and Faas to summary judgment.

In view of our disposition, we need not address whether Scott made out a prima facie case of retaliation.

IV.

We turn now to Scott's recusal motion, which the district court denied in *United States v. Metro. Health Corp.*, No. 1:02-CV-485,2006 WL 763180 (W.D. Mich. Feb. 23, 2006).

Preliminarily, we note that a judge is presumed to be impartial, and the party seeking disqualification "bears the substantial burden of proving otherwise." *United States v. Denton*, 434 F.3d 1104, 1111 (8th Cir. 2006). The burden is not on the judge to prove that he is impartial. *In re McCarthey*, 368 F.3d 1266, 1269 (10th Cir. 1004).

Title 28 U.S.C. § 144, entitled Bias or prejudice of judge, provides as follows:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse

> party, such judge shall proceed no further therein . . . .
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Recusal is mandatory under § 144 once a party submits a timely, sufficient affidavit and her counsel certifies that the affidavit is made in good faith. *United States v. Sykes*, 7 F.3d 1331, 1339 (7th Cir. 1993)

A § 144 affidavit is timely if it is submitted "at the earliest moment after the movant acquires knowledge of the facts demonstrating the basis for such disqualification." *Id.* For purposes of § 144, a district court is required to accept as true the factual allegations of the movant's affidavit, but the court "may only credit facts that are sufficiently definite and particular to convince a reasonable person that bias exists; simple conclusions, opinions, or rumors are insufficient." *Hoffman v. Caterpillar, Inc.*, 368 F.3d 709, 718 (7th Cir. 2004). The § 144 affidavit must state factual averments with particularity as to time, person, place, and circumstances. *Tezak v. United States*, 256 F.3d 702, 717 (7th Cir. 2001). For purposes of § 144, a district court must treat properly presented factual allegations as true, even if it knows or believes

them to be false, but it is not bound to accept the conclusions that the movant would draw from those facts. *Id.*

Here, we need not consider whether Scott's recusal affidavit was timely and sufficient for purposes of § 144 because Scott does not contest Metro's statement that she failed to file the certificate of counsel required by that section. Accordingly, Scott never placed a § 144 recusal motion properly before the district court. The requirements of § 144 are strictly construed to prevent abuse because the statute is heavily weighted in favor of recusal. *Hoffman,* 368 F.3d at 718. *See, e.g., United States* v. *Occhipinti,* 851 F. Supp. 523 (S.D. N.Y. 1993), which reasoned correctly that

> a careful reading of § 144 clearly shows that a motion for recusal should be accompanied by both a factual affidavit and a separate certificate that the affidavit was made in good faith. Totally disregarding the statute, petitioner offers a single "Certification" which purports to satisfy the requirements of § 144. Moreover, while petitioner's counsel states that the allegations which he has raised are true and acknowledges that if they are "willfully false, [he] is subject to punishment," this blanket statement does not satisfy the statutory requirement that counsel certify that the motion is made in good faith.

Id. at 527 (record citation omitted).

Because Scott did not properly raise the § 144 recusal issue below, we decline to consider whether

recusal might have been required on a proper motion under that section. *See Perez v. Oakland Cty.*, 466 F.3d 416, 430 (6th Cir. 2006) ("We do not consider an argument raised for the first time on appeal unless the party shows that refusal to consider the argument would result in a miscarriage of justice.").

Scott's recusal motion also invoked another statutory provision, however, which did not require her to file a certification of counsel. This latter provision addresses the perception of impartiality generally, and financial conflict of interest in particular, and provides as follows:

> (a) *Any* justice, *judge,* or magistrate judge *of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.*
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> (b) *He shall also disqualify himself in the following circumstances:*
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> *(1) Where he has a personal bias or prejudice concerning a party . . . ;*
>
> *(4) He knows that* he, individually or as a fiduciary, or *his spouse . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;*
>
> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(I) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

28 U.S.C. §§ 455(a) & (b) (emphasis added). The statute defines "financial interest" as "ownership of a legal or equitable interest, however small, or a relationship as a director, adviser, or other active participant in the affairs of a party," with exceptions not relevant here. 28 U.S.C. § 455(d)(4).

Because those safeguards (§ 144's affidavit and certification-of-counsel requirements) are lacking, § 455 does not require the judge to "accept as true the allegations made by the party seeking recusal." *In re Martinez-Catala,* 129 F.3d 213, 220 (1st Cir. 1997). Rather, the district court may make the necessary factual findings and decide whether the facts warrant disqualification. *Id.* When considering a § 455 recusal request, "the judge is free to make credibility determinations, assign to the evidence what he believes to be its proper weight, and to contradict the evidence with facts drawn from his personal knowledge." *United States v. Balistrieri,* 779 F.2d 1191, 1202 (7th Cir. 1985).

Section 455 is designed "'to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible.'" *Union Planters Bank v. L&J Dev. Co., Inc.*, 115 F.3d 378, 383 (6th Cir. 1997) (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988)). Under § 455, the ultimate question is whether "a reasonable, objective person, knowing all of the circumstances, would have questioned the judge's impartiality." *United States v. Hartsel*, 199 F.3d 812, 820 (6th Cir. 1999). Because the standard is objective, the judge need not recuse himself based on the subjective view of a party. *United States v. Sammons*, 918 F.2d 592, 599 (6th Cir. 1990).

When the objective appearance-of-partiality standard presents a close question, "'the judge must recuse himself.'" *Union Planters Bank*, 115 F.3d at 383 (quoting *United States v. Dandy*, 998 F.2d 1344, 1349 (6th Cir. 1993)). Nonetheless, as the late Chief Justice Rehnquist noted, "a federal judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified." *Laird v. Tatum*, 409 U.S. 824, 837 (1972) (emphasis omitted).

Scott's first ground for recusal is that the "Judge had, through his wife, an ongoing financial interest, within the meaning of 28 U.S.C. §§ 144, 455 and the case law thereunder, in this case resolving favorably to defendant . . . ." We consider Scott's first ground as a claim under § 455(b)(4), which requires a judge to recuse himself when "his spouse . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding."

The judge's wife is employed by the law firm Miller Canfield. While the judge's wife was an attorney at Miller Canfield's Kalamazoo office, attorneys in that firm's Ann Arbor office represented UBS Financial Services, Inc. ("UBS") in connection with UBS's underwriting of $165 million in bonds issued by Metro to finance construction of a new hospital complex.

Scott alleged that her *qui tam* action, and the government's November 2003 intervention in a portion of the action, generated adverse publicity that delayed Metro's bond sale several months past its scheduled date in December 2003. While Metro denies that Scott's *qui tam* action was responsible for the delay, we assume arguendo that it was.

Scott emphasizes that Metro settled the *qui tam* claims in December 2003, just days before the bonds were to be sold. Metro settled the fraud claims by agreeing to pay the government about $6.25 million in FCA damages. Scott quotes a Metro spokesman's contemporaneous statement, "The bond marketplace likes certainty. If we had decided to litigate [the *qui tam* claims], we would have had a problem selling the bonds."

Scott charged that the judge's wife, and therefore the judge, stood to gain if Scott's *qui tam* action were resolved in favor of Metro:

> When the bond sale was halted in December 2003, the bond underwriter, UBS . . . had already invested significant resources into this plan. Thus, there was a huge financial incentive, not only for [Metro], but also for UBS,

> to make the bond sale a reality . . . . Importantly, Pamela Enslen had just recently rejoined Miller Canfield as Senior Counsel . . . (UBS's legal counsel on the bond sale) at that time. It is reasonable to conclude that failure of the bond sale would have constituted a big loss to UBS and Miller Canfield and that these entities clearly benefitted from making the Mary Scott [*qui tam*] case go away so as to get the bond sale back on track.

But Scott fails to tie the judge's alleged financial stake (through his wife's firm's stake in the success of its client UBS, which underwrote Metro's bond issue) with the judge's rulings in this action. As the district court observed, Metro's summary judgment motion could not affect Metro's bond sale one way or the other: the bonds were successfully issued and sold well *before* the district court ruled on the retaliatory-discharge claim. Whatever benefit Miller Canfield derived from the success of the bond sale on which it advised UBS, it had already derived before the district court ruled. Thus, whatever benefit the judge's wife allegedly derived indirectly from the success of the bond sale on which her employer advised UBS, she derived it before the court ruled.

Scott tries to get around this inconvenient fact by implying that the judge made up his mind, before the Metro bond sale, about how he would rule on summary judgment, and "telegraphed" his prejudice to the underwriter (UBS) and other parties interested in the bond sale. Scott writes:

> Appellees attempt to make much of the fact that the bond sale was ultimately completed before [the judge] actually entered his order dismissing the Mary Scott litigation. So what? The fact that the sale went through several months before the decision actually was issued is not in and of itself dispositive of anything.
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> * * *
>
> [T]he fact that the bond sale was completed in the Spring of 2005 and the final decision of [the judge] in this case was not issued until Summer of 2005 does not in and of itself mean that there was no connection between the two events. If the final decision of [the judge] was in fact made to benefit clients of his wife's law firm, then certainly it is not inconceivable that his wife (and thus her law firm's clients) might have known of the impending decision before it was issued.

Scott admits, as she must, that this serious charge is nothing more than speculation: "Again, Mary Scott does not make such a statement in order to say that is in fact what happened. * * * [S]he simply does not know, and has no way of knowing, if that is what happened." But it is not enough for Scott to throw out charges and then maintain that they cast a pall over the proceedings because they are "not inconceivable." The judge is presumed to be impartial, and Scott "bears the substantial burden of proving otherwise." *Denton*, 434 F.3d at 1111. It is not the burden of the judge, or the prevailing party, to *dis*prove or rule out any "conceivable" chain of events the movant can

dream up. Scott offers nothing that would lead a reasonable, objective observer to suspect that the judge told anyone in advance how the case would turn out.

In addition, Scott does not allege that the judge's wife was involved in Miller Canfield's representation of UBS on the Metro bond sale. Indeed, Scott does not allege that the judge's wife even represented Metro or UBS on matters other than the bond sale. *Contrast In re Aetna Cas. & Surety Co.*, 919 F.2d 1136 (6th Cir. 1990) (recusal was required because, *inter alia*, the judge's daughter had been employed by a firm that represented a party in that very case and she had participated in depositions therein, even though she had since resigned from the firm and her now- former firm was not involved in all the consolidated cases).

Going a step further back in the "chain," Scott failed to present any evidence that the failure or further delay of the bond sale would have affected Miller Canfield substantially in the first place. For example, Scott did not present evidence that Miller Canfield's fees from UBS were contingent upon the success of the bond sale. Nor did Scott present evidence that the damage to Miller Canfield's revenues from the failure of the bond sale would have represented a substantial portion of its revenues.

Moreover, given that the judge's wife is not a partner at Miller Canfield and has no equity, ownership, or profit-sharing interest in the firm, Scott failed to explain how she would reap any discernible financial benefit from the later grant of summary judgment to Metro. Scott presents no evidence that the judge's wife's compensation was formally or informally

tied to the success of the firm's representation of UBS, the success of the UBS underwritten bond sale, or the firm's revenues or profits generally. *See United States v. McDonald*, Nos. 97-5187,97-5196, 97-5338, 97-5339, & 97-5556, 173 F.3d 430, 1999 WL 149658, at * 13 (6th Cir. Mar. 1, 1999) (judge not required to recuse herself due to husband's employment with law firm that had represented one of the defendants in an unrelated civil matter; "[t]he law firm was not involved in the present action, and there was no way that the judge could have financially benefitted from the law firm's representation of [the defendant], due to the law firm's fee structuring arrangement."). *Accord In re Kansas Pub. Employees Ret. Sys.*, 85 F.3d 1353,1364 (8th Cir. 1996) (judge's daughter's acceptance of job with defense counsel did not require recusal; among other things, the daughter "was to be a salaried employee . . . , not a partner whose income is directly related to the profit margin of the firm and could be substantially affected by the outcome of this case").

One might assume that an attorney is better off if his firm's clients prosper, in the general sense that the firm needs clients in order to earn enough revenue to cover its expenses (including salaries and benefits) and avoid eventual pay cuts, layoffs, or dissolution. But any postulated long- term general financial "benefit" to the judge's wife from her employer's client's success is not verifiable, let alone quantifiable, so Mrs. Enslen's supposed stake in the success of UBS's Metro bond sale is far too attenuated and speculative as a matter of law. *See IQ Prods. Co. v. Pennzoil Prods. Co.*, 305 F.3d at 368, 378 (5th Cir. 2002) ("An associate's continued employment or the amount of his bonus may depend on the financial success of the firm. However, this is an

insufficient interest to require disqualification . . . ."). Similarly, in *Sensley* v. *Albritton*, 385 F.3d 591 (5th Cir. 2004), the Fifth Circuit held that recusal was not required due to the judge's wife's employment with the same D.A.'s office that represented defendant in the case *sub judice*. The Fifth Circuit explained that the parties seeking recusal

> are only able to make this argument by layering several speculative premises on top of one another to reach a speculative conclusion: if District Attorney Levy loses this case, it *might* adversely affect his political popularity; and if it adversely affects his political popularity, he *might* lose his next election; and if he loses his next election, [the judge's wife] *might* lose her job if the new district attorney chose not to retain her. This edifice of conjecture will not support an objective conclusion that [the district judge] has a financial interest in the outcome of this case.

Id. at 600.

Next, Scott suggests that even if Miller Canfield would have suffered no substantial financial harm from the failure of the Metro bond sale, it would have suffered substantial non-financial harms. Scott reasons,

> [T]he financial position and outlook of the clients of the Miller Canfield law firm improved dramatically upon the dismissal of Mary Scott's claims . . . . [It] would not be illogical for a reasonable person to conclude that Miller

> Canfield would — and did — benefit from its clients' good fortune, if not in a pecuniary fashion, then at the very least in terms of the reputation and goodwill associated with the firm.

But even if we accept this argument, it is again impossible to do more than speculate that the judge's wife might someday reap a benefit as an indirect result of the success of one or more of her employer's clients on a particular transaction.

The Eighth Circuit rejected an argument similar to Scott's in *United States v. Tierney*, 947 F.2d 854 (8th Cir. 1991), a prosecution for tax offenses and fraud against the United States. The defendant moved to recuse the prosecutor under 18 U.S.C. § 208(a), which prohibits a federal employee from participating in a matter in which his spouse has a financial interest, and under a regulation that prohibited a Department of Justice employee from participating in a prosecution if he has a personal relationship with anyone who has a "specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution." *Tierney*, 947 F.2d at 864. The prosecutor's husband was a partner in a firm that represented an insurer that had sued for declaratory judgment rescinding the defendant's insurance policy. *Id.* at 864-65. The Eighth Circuit held that the prosecutor and her husband did not have an interest sufficient to require recusal:

> Although the prosecutor's husband did not participate in the case, defendant nevertheless reasons that because defendant's alleged

> dishonesty might bar recovery under the insurance policy, the insurer and its law firm would benefit from a guilty verdict. The district court agreed that the insurer would benefit, but found that because the husband's law firm was paid on an hourly basis, it would not benefit from a guilty verdict, and the husband's interest as a partner in the firm was therefore too "remote and speculative" to implicate either [18 U.S.C.] § 208 or Justice Department regulations. * * *
>
> [D]efendant argues that even partners in a firm which bills clients by the hour have an interest in winning a suit, because the firm's reputation (and thus each partner's income) benefits from victory. Although such partners may have an interest in prevailing, we believe that this interest is simply too insubstantial to require disqualification of a partner's spouse [even] in related litigation.

Id. at 865. Like the Eighth Circuit in *Tierney,* we hold that "disqualification is not required on the basis of [such] remote, contingent, indirect or speculative interests." *United States* v. *Bayless,* 201 F.3d 1 16, 127 (2d Cir. 2000).

Finally, Scott's reasoning tends to support the notion that the judge's wife had an interest in *the qui tam claims* being resolved in favor of Metro so that the Metro bond sale could go forward. Scott's argument does *not* show that the judge's wife had an interest in Scott's *discharge claim* being resolved in Metro's favor. As mentioned above, the bond sale took place after

Metro settled the *qui tam* claims (March 2005 compared to December 2003), but *before* the district court ruled on the discharge claim (summer 2005). Thus, any adverse publicity or perceived financial uncertainty attributable to the pendency of the discharge claim did not, in fact, thwart the bond sale.

Conversely, once the Metro bonds issued, underwriter UBS could not have any interest in the discharge claim being removed as an obstacle to the sale. Therefore UBS's counsel (Miller Canfield) and its counsel's employees (the judge's wife) could not have any derivative or "down-the- line" interest in removing the discharge claim as a possible obstacle to the sale.

We conclude that the district court did not abuse its discretion in finding that a reasonable, objective person knowing all the circumstances would not question the judge's impartiality based on his wife's employment with Miller Canfield. *Cf: In re Drexel Burnham Lambert, Inc.*, 869 F.2d 116, 118 (2d Cir. 1989) (Miner, J., concurring in denial of reh'g en banc, joined by Meskill, Cardamone, and Pierce, JJ.) (recusal not warranted by judge's wife's sale of stock to a buyer whose purchase was financed by Drexel Burnham, which was a party to the action).

Scott's second ground for recusal is that the judge's wife serves on a Michigan Bar committee with then-District Judge McKeague, who had a law clerk whose uncle, Bruce Neckers, is lead counsel for Metro in this matter. This argument is difficult to comprehend. Defense counsel's nephew clerked for Judge *McKeague*, not the district judge presiding over

the instant case, so the nephew could not work on the instant case.

Perhaps Scott is theorizing that the judge had an incentive to resolve her discharge claim favorably to Neckers' client, in order to benefit Neckers, in order to benefit (in an unspecified manner) Neckers' nephew, in order to please the nephew's former employer Judge McKeague, in order to ensure pleasant interaction between Judge McKeague and the judge's wife on the state bar committee. As a matter of law, such a connection is too attenuated to lead a reasonable, objective observer to question the judge's impartiality.

In any event, Scott herself "readily concedes that this type [of] relationship in and of itself would not be sufficient to warrant recusal of a federal judge" and that "if this were the only conflict . . . that she had discovered relative to the trial judge and this litigation, she would never have requested that the trial judge recuse himself. . . ." *See generally Comfort v. Lynn Sch. Comm.*, 418 F.3d 126 (1st Cir.) ("Every judge comes to the bench with a lifetime of background experiences, a roster of associations, and a myriad of views. This past history, in and of itself, is seldom sufficient to require recusal."), *cert. denied*, — U.S. —, 126 S. Ct. 798 (2005).

Scott contends, however, that "when viewed in light of all of the other items : . . the relationship between attorney Bruce Neckers and the trial court does *nothing* to reduce the *appearance* of partiality." As discussed above, the "other item" - the judge's wife's employment with Miller Canfield - would not lead a reasonable objective observer to question the judge's

partiality. Thus, there is nothing to view the McKeague clerk connection "in light of." It must stand on its own merits - and it does not.

Scott's third ground for recusal is that the judge's rulings granting summary judgment and imposing sanctions, and his opinions explaining the rulings, demonstrate palpable bias against Scott. To prevail on a recusal motion on this basis, Scott had to show either extrajudicial bias or a deep-seated unequivocal antagonism toward the petitioner. *Liteky v. United States*, 510 U.S. 540, 554-55 (1994) (Scalia, J.). The Supreme Court cautions that

> remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge . . . . *Not* establishing bias or partiality. . . are expressions of impatience, dissatisfaction, annoyance, and even anger that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges; sometimes display.

Id. at 555-56.

With regard to the judge's rulings against Scott, "[b]ias cannot be inferred from a mere pattern of rulings by a judicial officer, but requires evidence that the officer had it 'in' for the party for reasons unrelated to the officer's view of the law, erroneous as that view might be." *McLaughlin v. Union Oil Co. of Calif.*, 869 F.2d 1039, 1047 (7th Cir. 1989). This principle is well-established in our circuit. *See Woodruff v. Tomlin*,

593 F.2d 33, 44 (6th Cir. 1979) ("Such recusal [under 28 U.S.C. § 455(a)] cannot be based on decisions or rulings of a judge.") (citing *Oliver v. Mich. State Bd. of Educ.*, 508 F.2d 178 (6th Cir. 1974)), *on reh'g o.g.*, 616 F.2d 924 (6th Cir. 1980).

As evidence of the judge's bias, Scott complains that the judge ruled on significant motions without hearing oral argument, including Metro's motion for summary judgment on her discharge claim. Scott fails to acknowledge, however, that dispositive motions are routinely decided on papers filed by the parties, without oral arguments, just as this court often hears and determines appeals without oral argument. *Commodities Export Co. v. United States Customs Serv.*, 888 F.2d 431, 439 (6th Cir. 1989) (Nelson, J., concurring in part & dissenting in part o.g.). Indeed, the district's local rules provide, "In its discretion, the Court may schedule oral argument or may dispose of the motion without argument at the end of the briefing schedule." W.D. MICH. L.CIV.R. 7.2(d). Scott fails to mention that Metro also requested oral argument on its summary judgment motion, and the district court denied that request, too.

Scott's recusal motion also asserted that the district judge *sua sponte* raised and resolved unbriefed issues against her. However, Scott's recusal motion failed to give *any* example of an unbriefed issue raised on the judge's own initiative. Her appellate recusal brief likewise fails to specify the unbriefed issues allegedly raised *sua sponte* by the judge.

As further evidence of the judge's alleged bias against her, Scott points to "the granting of the

extraordinarily high and unjustified sanctions against her. . . which, when examined through the lens of the undisclosed relationships recently discovered, clearly give the appearance that such relationships improperly affected the outcome of this case." As discussed above, however, neither the judge's wife's employment nor defense counsel's nephew's former clerkship comes close to constituting persuasive evidence of bias, conflict of interest, or even a realistic *appearance* of bias or conflict of interest. Thus, the sanctions awarded against Scott are not properly viewed "through the lens" of those relationships, but on their own merits. As discussed below, neither the imposition of sanctions, nor the determination of the amount of the sanctions, constituted an abuse of discretion. Therefore, the sanctions orders cannot support Scott's allegations of judicial bias.

Scott next contends that a reasonable person could infer bias from the fact that the judge issued opinions that "were harshly and critically written so as to vilify and castigate Mary Scott on a personal level." Scott points to three instances where the judge allegedly "interject[ed] his own personal predilections about her . . . ." First, in the opinion granting summary judgment to Metro, the judge's discussion of Scott's alleged protected activities began as follows: "Against this background, there is the portrait that Scott has painted of herself as the corporate/FCA avenger." Second, the next sentence of the opinion read, "To her credit, her personnel file *per se* was kept squeaky clean and free from reprimands, discipline and the like." Third, the summary judgment opinion's Background section states,

> In any event, the record is murky as to whether, when Scott was assigned the additional responsibility of managing Metropolitan's White and White [medical supply] subsidiary in January 2000, this was because of technical excellence (Plaintiffs view), because she was "kicked upstairs" to avoid an area of incompetence — i.e., interpersonal relations (Defendants' view), or for both reasons.

United States v. Metro. Health Corp., 375 F. Supp. 2d 626, 630 (W.D. Mich. 2005) (footnote omitted). As a result of the judge's characterizations of Scott, she claims the press began to portray "the once lauded whistleblower . . . as a criminal and immoral wrongdoer, while Metropolitan's image was sanitized."

As to the judge's tone and his comments about Scott's conduct and character, Scott contends that the judge "engaged in excessively hostile and unjustified personal attacks against Mary Scott (which have been amply evidenced by, among other things, the trial judge's excessive choice of language, including mocking her as the 'FCA avenger'"). Scott's appellate briefs, however, do not cite to the record for proof that the judge made this comment. If the judge made the comment at a hearing, Scott could present either a transcript or recording of the hearing, or a statement that the hearing was not transcribed or recorded; she has done neither, so we cannot simply accept her assertion that the judge made the "avenger" comment.

First, there is no reason to believe that the judge's apparently negative opinion of Scott stemmed from extrajudicial experiences or sources. A reasonable

observer would conclude merely that the judge formed a negative opinion of Scott from the voluminous evidence in the case, and from the parties' conduct in the litigation. The evidence showed that Scott was terminated due to misconduct (warranting summary judgment on her discharge claim) and altered and withheld evidence (warranting sanctions).

Our decisions formerly held that "[t]he judge's impressions o[r] perceptions based upon information gained during the trial cannot be the basis of an allegation of bias." *Liberis v. Craig*, No. 87-5321, 845 F.2d 326, 1988 WL 37450, at *4 (6th Cir. Apr. 25,1988) (citations omitted). The rule now, however, is that "[o]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion *unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible*." *Alley v. Bell*, 307 F.3d 380, 388 (6th Cir. 2002) (emphasis added) (quoting *Liteky*, 510 U.S. at 555).

It is immaterial whether the judge's comments, such as the comment about the potentially criminal nature of Scott's spoliation, were legally "correct." What matters is that the comments stemmed from the judge's experience with the parties' conduct and his review of their evidence and arguments. Again, as the Supreme Court has explained,

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards [a party], who has been shown to be a thoroughly reprehensible person. But the

> judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings . . . .

Liteky, 510 US. at 550-51. Viewing the comments in this context, they do not betray a "deep-seated favoritism or antagonism that would make fair judgment impossible," *Alley*, 307 F.3d at 388.

Scott further charges:

> The trial judge consistently turned a blind eye to the fraudulent and underhanded actions of Appellees in all areas, from securing the certificate of need [for a new hospital] by "rigging the numbers," to sabotaging Mary Scott in her relationship with her peers and subordinates.

This argument misses the mark as well. First, whether Metro submitted false information to the State to secure the certificate required for its new facility has no bearing on whether Scott's discharge claim should survive summary judgment, or on whether Scott should pay sanctions for her misconduct. Therefore, it would have been unnecessary and inappropriate for the district judge to address the certificate-of-need allegation. Second, Scott fails to explain how Metro sabotaged her relationship with peers and subordinates, and she does not explain why the district judge should have considered that alleged sabotage.

Scott further charges, "The trial judge unjustifiably castigated Mary Scott for legally taping conversations

to which she was a party . . . ." (Emphasis omitted.) Specifically, the court wrote,

> Plaintiff. . . dispute[s] Faas' rationale for withholding the bonus [in 2001] — arguing that it was explained to her in a meeting with Faas that the "in fighting" issue was not confined to her and [Metro's Chief Operations Officer Tim] Crowley, but was an issue for all Board members. Plaintiff also made a secret recording of portions of her meeting with Faas, . . . portions [of which] purport to support the above claim. At that time, and beforehand, Plaintiff was in the habit of making secret tape recordings of conversations she had with management and Metropolitan's legal counsel, Jeff Fraser, according to her former assistant . . . . The circumstances of the recording of these tapes by Plaintiff — including that the recordings are selective and possibly incomplete, and that portions of the tapes are inaudible — when combined with the furtive and suspicious nature of the taping, and the "accidental" loss of some documented tape recordings, makes those recordings suspect evidence indeed. Nevertheless, the Court will consider such evidence in the context of the present summary judgment motion.
>
> What is clear from Plaintiffs admissions[,] though, as well as the fact that she felt a need to make secret and selective tape recordings of others, is that she was unhappy with her employment situation with Metropolitan— in the fall of 2001.

United States v. Metro. Health Corp., 375 F. Supp. 2d 626, 630-31 (W.D. Mich. 2005). We find nothing suggestive of personal bias in the judge's comments about Scott's tapes. The characterization of Scott's recordings as "secret" and "furtive" are indisputably accurate; Scott does not claim she made the recordings with the knowledge of those recorded. Likewise, Scott does not deny that portions of the tapes are inaudible, that some of her tapes omit portions of the conversations in question, and that she failed to produce some tapes that she claimed she made. Thus, there is nothing inaccurate, let alone biased, about the judge calling the tapes "selective" and "possibly incomplete" and concluding that these concerns undermined the trustworthiness and probative value of the excerpts Scott chose to introduce.

Scott also sees bias in the judge's statement that it would have been inclined to grant Metro's motion to exclude the tapes at trial. Specifically, the district court stated,

> Though the Court has elected to review such evidence, the parties should be advised that the Court is of the view that Defendants' Motion *in Limine* Regarding Tape Recordings and Transcripts is well received and would justify the preclusion of the tapes and transcripts were this matter tried[,] given the provisions of Federal Rules of Evidence 403, 1002, 1003, and 1004 and case law pertaining to the common law doctrine of spoliation . . . .

United States v. Metro. Health Corp., 375 F. Supp. 2d 626, 631 n.5 (W.D. Mich. 2005). While it was

unnecessary for the court to telegraph how it would have ruled on the motion *in limine*, there was nothing suggestive of personal bias about doing so. Moreover, because the court granted summary judgment to Metro, Metro's motion *in limine* became moot.

Scott complains that the judge "labeled [her] a criminal for making corrections to draft minutes without taking any evidence on the substantive accuracy of the corrections of Appellee Faas's statements on the physician compensation model (which, despite what was allegedly said at the meeting, were not historically accurate)." (Emphasis omitted.) Specifically, the judge wrote,

> In this case, Plaintiff has admitted facts which establish beyond any genuine issue of material fact that she wrongly altered corporate records and that she withheld from the corporation tapes evidencing corporate minutes. The withholding of the tapes was not "protected conduct" as argued by her counsel since she and her counsel were free to make arrangements with independent counsel for the safeguarding and/or copying of the tapes so as to protect her legitimate interests in the evidence. Moreover, the alteration of the corporate minutes was not only bad conduct, it was a crime under Michigan and common law.
>
> Michigan law provides:
>
> > An officer or agent of a corporation who knowingly falsifies or wrongfully alters the books, records, or accounts of a

> corporation is guilty of a misdemeanor and is subject to a fine of [sic] not to exceed $1,000.00 for each such offense.

MICH. COMP. LAWS § 450.1932(2).

* * *

> Plaintiffs own admissions — that she altered the minutes to make them true in some sense to a prior meeting — does not establish even a legal defense to a criminal charge. Under Michigan law, proof that a criminal defendant acted knowingly is sufficient evidence to convict of a criminal offense requiring a *scienter* element of "knowing" conduct; the fact that a defendant may have been motivated by an altruistic or pure motive is irrelevant. *See People v. Medlyn*, 544 N.W.2d 759, 761 (Mich. Ct. App. 1996); *People v. Harrell*, 221 N.W.2d 411, 416 (Mich. Ct. App. 1974).

United States v. Metro. Health Corp., 375 F. Supp. 2d 626, 646-47 (W.D. Mich. 2005). Scott implies misleadingly that the district judge merely tossed the epithet "criminal" at her due to his personal animosity against her. Rather, as the quoted portion of the opinion shows, the judge quoted a Michigan criminal statute that covers conduct such as that *admitted* by Scott, and explained why her asserted good motive in secretly altering corporate minutes would not be a defense, on the authority of published decisions of the Michigan appellate courts. Scott continues to maintain that the original draft minutes "were not historically accurate," but she does not deny that she (1) furtively

tried to locate the minutes from her assistant's desk, (2) altered the minutes, (3) failed to tell her employer that she altered the minutes, and (4) introduced the altered minutes without providing the original version or honestly notifying anyone that she had altered the minutes.

It is also noteworthy that Scott does not try to identify any shortcoming in the judge's analysis of Michigan law. The evidence that was available to the judge tends to support the conclusion that Scott could be held criminally liable in Michigan for her admitted alteration of corporate minutes, and she offers nothing to undermine that conclusion. There is no reason to believe that the judge's discussion of Michigan criminal law as applied to Scott was inaccurate, let alone motivated by bias.

Scott sees bias in the judge's "[m]aking findings of fact based on his total acceptance of affidavits from Appellees and rejection of affidavits of Mary Scott as not credible." In a variety of contexts, assessments of credibility (or determinations that rest in part on such assessments) are committed to the sound discretion of the lower tribunal; we do not disturb those assessments unless the aggrieved party demonstrates an abuse of discretion. *See United States v. Crumb*, 187 F. App'x 532, 536 (6th Cir. 2006) (when a defendant makes a FED. R. CRIM. P. 33 motion to set aside a verdict as against the manifest weight of the evidence and set a new trial, "the district court may assess witness credibility and we review for abuse of discretion . . . ."); *Huff v. Metro. Life Ins.* Co., 675 F.2d 119, 123 (6th Cir. 1982) (affirming denial of motion for reconsideration of summary judgment because "we

find no abuse of discretion in the district court's determination that the evidence would not be considered because it was not newly discovered and its credibility was doubtful"). Scott makes no attempt to show that the district court abused its discretion by finding Metro's affidavits to be more credible than hers.

The judge's credibility assessment is most simply and logically explained by the evidence in the record, not by speculation about otherwise unproven bias. Most significant, Scott proved herself to be untrustworthy and untruthful when she (1) surreptitiously altered minutes of the February 7, 2002, board meeting; (2) took tapes of that meeting from her assistant in April 2002 and refused requests to return them, removing the most direct, objective means of verifying what was said at the meeting; (3) said she intended to review the tapes to make sure her unauthorized alteration ("correction") of the draft minutes was accurate, but somehow never found the tapes in order to perform that check; (4) admittedly found one of the tapes, which contained part of the meeting, in June 2002, but withheld it; and (5) later in this litigation, by "sheer luck," found all three tapes of the meeting. On this record, the judge did not need personal bias to conclude that Scott was less credible than Metro as to her conduct and the cause of her discharge.

Scott complains that the district court accused her of "actively [seeking] legal counsel to find a way to sue" Metro. However, in the passage of the summary judgment opinion cited by Scott, the district court accurately recounts communication between Scott and

her attorney showing that by February 25,2002 — nearly two months before Scott's April 17, 2002, reassignment — Scott and her attorney had discussed possibly filing a claim for sex discrimination, apparently before even discussing a whistleblower retaliation claim. In addition, Scott's own writings show that she first contacted the same attorney in May 1999, nearly three years before her reassignment, regarding her perception that Metro was discriminating against her, apparently on the basis of sex and age. The record supports a characterization of Scott as looking "early and often" (our words, not the district judge's) for grounds on which to sue Metro, even before her reassignment. The judge did not imply, let alone state, that there was anything illegal or unethical about Scott contacting an attorney repeatedly over the course of the years and harboring many grievances against Metro. A reasonable, objective observer would not question the judge's impartiality based on these limited, accurate comments.

Scott also charges that the district court displayed bias by

> [m]aking a myriad of factual findings that totally lack objectivity and ignore what is in the record as fact, i.e. [sic, she means e.g.], finding that reports to Appellee Faas lacked specificity and did not rise to [the level of] allegations of fraud or fault, ignoring that the United States government ultimately pursued said fraud in the amount of $40,000,000.

(Record citations omitted.) Scott does not identify any other of these "myriad" of factual findings. Most of the portion of the summary judgment opinion cited by Scott has nothing to do with the specificity of reports to defendant Faas. As to the portion of the opinion that may be relevant to Scott's charge, she fails to explain which of the statements display a bias and how, so she has abandoned the argument.

Scott's penultimate complaint about personal bias concerns the judge's remark that because Scott's affidavit made an allegation that she had never made before, "caution must be had." The portion of the opinion cited by Scott does not contain the "caution must be had" language, but she is presumably referring to this statement earlier in the opinion:

> Plaintiffs testimony about her top secret, undocumented meetings with Faas relating to her unfinished memos is interesting for reasons other than its sheer unlikeliness . . . . Because the testimony presents for the first time specific testimony about prior meetings in a case in which neither discovery, deposition testimony [n]or extensive prior court filings have previously disclosed these matters, caution must be had. Plaintiff stated in a document filed on May 13, 2005 that Plaintiffs protected activity consisted of memorandums to Faas relating to Revenue Cycle. Indeed, Defendants took Plaintiffs deposition and specifically asked whether she had any meetings with Faas about vascular studies. She said "she did not . . ." (Scott Dep. at 523, Reply Mem., Ex. B) * * *

United States v. Metro. Health Corp., 375 F. Supp. 2d 626, 641-42 (W.D. Mich. 2005). Scott conveniently omits the discussion preceding and following the judge's "caution must be had" statement. It was eminently reasonable for the judge to look skeptically at Scott's claim that she met with Faas about vascular study payments and lack of written orders, given that the claim contradicted her deposition testimony. The "caution must be had" comment does not evince personal bias.

Finally, Scott alleges bias in the judge's statement that she had "a history of litigation shenanigans, including repeatedly hiding discoverable evidence. As such, the newly-minted evidence [Scott's affidavit claiming, contrary to her deposition, that she had secret meetings with Faas about vascular study overcompensation and lack of written orders] will be excluded from consideration." *United States v. Metro. Health Corp.*, 375 F. Supp. 2d 626, 643 (W.D. Mich. 2005) (footnotes omitted). As discussed above, Scott's affidavit claim about secret meetings with Faas did contradict her deposition testimony.[3] Moreover, she *did* hide discoverable information; she admitted that she found one of the tapes of the meeting whose minutes she altered and that she nonetheless did not turn that tape over to Metro. The judge's choice of the word

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[3] As the district court noted, a party cannot create a genuine issue of material fact by submitting an affidavit that contradicts her earlier deposition testimony. In addition to the decisions cited by the district court, *see Moore v. Lafayette Life Ins. Co.*, 458 F.3d 416, 433 (6th Cir. 2006); *Lanier v. Bryant*, 332 F.3d 999, 1004 (6th Cir. 2003). Scott's affidavit did not merely "clarify" and "elaborate on" her deposition testimony, as she asserts.

"shenanigans" was, if anything, charitable, and no reasonable, objective observer would suspect that it stemmed from personal bias.

We conclude that "a reasonable, objective person, knowing all of the circumstances," would *not* have questioned the judge's impartiality based on the substance or tone of his opinions or in-court statements. *See Hartsel,* 199 F.3d at 820; *cf. Blanche Road Corp. v. Bensalem Twp.,* 57 F.3d 253, 266 (3d Cir. 1995) ("Although it is true that at times the judge criticized plaintiffs for attempting to mislead the jury and became short-tempered with plaintiffs' counsel, these comments appear to arise from the judge's impatience and frustration with the manner in which plaintiffs were trying their case, rather than any partiality for defendants.").

In short, none of Scott's grounds for recusal present a close question. Requiring this district judge to recuse himself would encourage litigants to present "speculative and ethereal arguments for recusal and thus arrogat[e] to themselves a veto power over the assignment of judges." *Draper* v. *Reynolds,* 369 F.3d 1270, 1280 (11th Cir. 2004). The district judge did not abuse his discretion in denying the recusal motion, so we affirm the February 23, 2006, order appealed in No. 06-1562.

Because it was not an abuse of discretion to reject Scott's recusal motion on the merits, we can assume arguendo that Scott's recusal motion was timely.

V.

Scott filed a motion to reconsider the order denying recusal, which the district court denied in *United States* v. *Metro. Health Corp.*, No. 1:02-CV-485, 2006 WL 763181 (W.D. Mich. Mar. 24, 2006).

A district court may grant a motion for reconsideration — a motion to alter or amend judgment under FED. R. CIV. P. 59(e) — only if the movant shows (1) a clear error of law, (2) newly discovered evidence, (3) an intervening change in controlling law, or (4) a need to prevent manifest injustice. *Henderson v. Walled Lake Consol. Schs.*, 469 F.3d 479, 496 (6th Cir. 2006). Scott does not claim there was a change in the controlling law after she filed her recusal motion, but she essentially invoked the other three grounds for reconsideration: clear error of law, new evidence, and a need to prevent manifest injustice.

As to newly discovered evidence, Scott argued as follows:

> [N]ew evidence has come to light which the Court should consider in re-evaluating its decision regarding an appearance of impropriety in this matter. Miller Canfield (where [the judge's wife] is employed) was counsel for not just one, but two, and possibly even three entities that have a direct financial interest in the outcome of Plaintiffs case. Specifically, in addition to Miller Canfield representing UBS, the underwriter for Metropolitan's bond issue, Miller Canfield also represents Standard

> Federal Bank . . . as the issuer of a direct pay irrevocable line of credit for the $30,000,000 Series B portion of Metropolitan's bond issue. Additionally, Standard Federal Corporate and Institutional Trust. . . serves as the Bond Trustee for the entire $165,000,000 Metropolitan bond issue.
>
> * * * It is objectively reasonable to infer that, in the discharge of its duties as counsel for both [UBS and Standard Federal], Miller Canfield . . . not only assessed the validity, risk and potential outcome of the Mary Scott retaliation case . . . , but had an interest in the outcome of said case given its fiduciary role with UBS and Standard Federal.

For two reasons, this argument is of no avail to Scott. First, Scott does not explain why she did not learn of Miller Canfield's representation of these other entities, whether through discovery or otherwise, before filing her recusal motion, and included it in that motion. As with other rules of civil and criminal procedure, Rule 59(e)'s new-evidence prong required Scott to show that due diligence would not have uncovered this evidence before the court ruled on her recusal motion; Scott makes no attempt at such a showing.

Even if we treated Miller Canfield's representation of bond issuer Standard Federal and bond trustee Standard Federal Corporate and Institutional Trust as newly discovered evidence, it does not support Scott's recusal argument. Whatever stake Miller Canfield had in the success of the bond sale was vindicated when

the bonds were sold — which took place before the court ruled on summary judgment.

Scott's reconsideration motion seemed to further theorize that if her discharge claim were resolved against Metro, the following sequence of events could occur: (1) the bondholders would demand payment on the bonds, (2) Standard Federal (which was represented by the judge's wife's employer) would have to pay the bondholders, (3) Standard Federal would seek reimbursement from Metro, and (4) Metro's payment of damages on Scott's retaliatory-discharge claim would not leave sufficient resources to reimburse Standard Federal.

Even parsing this convoluted and implausible scenario from Scott's confusing reconsideration motion, it is still not clear how that sequence of events is supposed to tangibly harm Miller Canfield, let alone the judge's wife (who, again, did not own an interest in the law firm) and thus the judge. Scott alludes, without explanation, to Miller Canfield's "fiduciary role" with UBS and Standard, but does not elaborate. Finally, Scott speculates that this sequence of events would seriously impact these three clients of Miller Canfield, but she does not say what significance we should attach to that possibility. Apparently Scott is implying that Metro, UBS, and Standard Federal would suffer such losses as to be unable to pay Miller Canfield as much for future representation. Even then, the connection to the judge's wife is at best extremely attenuated, as she does not have an ownership interest in Miller Canfield. In summary, such far-reaching speculation about unpredictable events affecting parties several times removed from the judge's wife's

employer could not lead a reasonable person to perceive any impropriety on the part of the judge.

Having concluded that Scott was not entitled to reconsideration of recusal due to newly discovered evidence, we consider whether the order denying recusal contained a clear error of law or worked a manifest injustice. We conclude that Scott was not entitled to reconsideration on these grounds either. Other than the reconsideration arguments addressed above, Scott complains only that the judge's orders and opinions "have been peppered with unnecessary personal statements about the plaintiff and [the] case (such as, "May God forgive us all that we have spent valuable moments of our lives with such piddling disagreements" or "This is the fag end of a long and bitter suit. What is left is to exact a measure of justice according to what has come before"). This argument does not merit reconsideration, either.

First, Scott could and should have cited these two comments in her recusal motion. A Rule 59(e) motion is not the proper vehicle to raise arguments that should have been made before judgment. *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999).

Second, Scott conveniently omits the language that accompanied the "God forgive us" statement. The district court was not calling the retaliatory discharge claim a "piddling disagreement." Here is the entirety of the footnote in which that statement appeared:

> Plaintiff has disagreed with [Metro counsel] Fraser's characterization that the Monday

> meeti[illegible] was the "first" meeting between Plainti[illegible], Varnum attorneys and the Executive Committee. This disagreement, like much of this record, is insignificant. What Mary Scott is referring to is that one Varnum attorney, Jackie Scott, was with Fraser at the April 19-20, 2002 meetings and identified herself then as a Board Member (which she was); the parties do not disagree apparently that other members of the Executive Committee besides Jackie Scott attended the first such meeting on April 22, 2002. May God forgive us all that we have spent valuable moments of our lives with such piddling disagreements.

US ex rel. Scott v. Metro. Health Corp., 375 F. Supp. 2d 626, 635 n.12 (W.D. Mich. 2005). This comment would not cause a reasonable, objective observer to suspect that the judge harbored personal bias against Scott that prevented fair judgment.

The March 24, 2006, order appealed in No. 06-1562 is also affirmed.

VI.

The district court's explanation of its sanctions decision adequately justifies its decision to find Scott liable for sanctions. The sanction amounts requested by defendants and awarded by the district court were well documented and close to the sum plaintiff admits incurring in this litigation. In this regard, we find no abuse of discretion and affirm for the reasons stated by the district court.

Based on Scott's conduct as described herein, and by the opinion below, the district court properly invoked Federal Rule of Civil Procedure 26 as authority for imposing sanctions on Scott.

In addition, Scott's conduct as described herein, and by the opinion below, justified the district court's decision to invoke Federal Rule of Civil Procedure 56(g) as authority for imposing sanctions on Scott.

The district court did not clearly err in finding that Scott submitted discovery filings that falsely certified that they were believed to be complete and accurate, in violation of Rule 26(g)(l) and (2). Nobody could know better than Scott whether she had all three tapes of the meeting. That was flatly within her knowledge, and it was not clear error to find that Scott knew she was lying when her initial disclosures and later responses certified that she had not "found" all of them.

Once the court found that Scott violated Rule 26, it was *obligated* to impose sanctions under Rule 26(g)(3). *Malautea* v. *Suzuki Motor Co.,* 987 F.2d 1536, 1545 (11th Cir. 1993).

Nor did the district court clearly err in finding that Scott submitted affidavits that she knew were not truthful, and that therefore she presented the affidavits in bad faith, in violation of Rule 56. Scott obviously knew whether, as alleged in her affidavit, she developed her version of the minutes based on her honest recollection of what happened, rather than fabricating a version of events that she knew never

occurred or inserting material to reflect what allegedly was said at a *prior* meeting.

Once the court found that Scott submitted an affidavit in bad faith, it was *obligated* to impose sanctions under Rule 56(g).

Finally, we hold that the district court did not abuse its discretion by invoking its inherent authority as an additional source of authority for the sanctions against Scott. In its opinion determining the amount of sanctions, the district court wrote persuasively,

> As noted in the Court's Opinion and Order of September 29, 2005, there are three bases for assessing liability against Plaintiff Mary Scott: inherent authority, Federal Rule of Civil Procedure 26(g) and Rule 56(g). Of these, inherent authority is obviously the most important because it touches all of Plaintiffs bad faith conduct during the litigation. A limited award under Rules 26 and 56 would not do justice to the magnitude of the offense.
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> * * *
>
> As indicated above, this Court has previously found Plaintiffs litigation conduct in this suit to have been in "bad faith" due to her pursuit of the factually baseless retaliation claim as part of a multi-million dollar lawsuit, the intentional concealment of multiple tape recordings, including the crucial minutes tapes, and the filing of intentionally false affidavits on the minutes issue. The filing and litigation of the

> retaliation claim was, in light of this record, motivated by an "improper purpose" to harass and extort Plaintiffs former employer. *See First Bank of Marietta*, 307 F.3d at 524 (citing *Big Yank Corp. v. Liberty Mut. Fire Ins. Co.*, 125 F.3d 308, 314 (6th Cir. 1997)). In short, this was a case, like *Chambers* and *First Bank of Marietta*, that was long brewed and fermented in the liquor of "bad faith."

Scott v. Metro. Health Corp., No. 1:02-CV-485, 2005 WL 3434830, at *3 and *6 (W.D. Mich. Dec. 13, 2005). We agree with the district court's reasoning.

VII.

For the foregoing reasons, we affirm the orders of the district court.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:02-CV-485

[Filed December 13, 2005]

UNITED STATES OF AMERICA *ex rel.* MARY SCOTT, Plaintiff,	)
v.	)
METROPOLITAN HEALTH CORPORATION d/b/a METROPOLITAN HOSPITAL,	)
and	)
MICHAEL FAAS, Defendants.	)

OPINION

This is the fag end of a long and bitter suit. What is left is to exact a measure of justice according to what has come before.

BACKGROUND

To summarize, this suit started as a presumptively legitimate *qui tam* suit under the False Claims Act. The *qui tam* portion of the suit was dismissed as part of a Settlement Agreement. Under such Agreement, Plaintiff received an 18-percent cut of the structured settlement, of which $777,058.64 has previously been paid Plaintiff, and $426,470.52 remains outstanding.[1] (Settlement Agreement, App. A.) These amounts represent a total of the 18-percent portions of Metropolitan Health Corporation's initial payment of $1 million dollars and 12 quarterly payments of $473,856.14 to the United States of America (of which five such payments remain).[2] The United States, under the *qui tam* Settlement Agreement, is required to transmit18-percent of each payment electronically to Plaintiff upon receipt from Metropolitan Health Corporation. (Settlement Agreement ¶ III.1.d.)

Of course, this suit did not end with the settlement of the *qui tam* claims. Plaintiff continued the suit to press an illegitimate 10-million dollar claim, one she

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[1] Plaintiff has indicated that her net recovery will be less due to taxes. While this may be true, it is quite beside the point.

[2] The December 5, 2005 payment was just made, but by separate Order of this Court was deposited into the Court's registry for distribution as determined by later order. This was pursuant to the Court's equitable jurisdiction to prevent irreparable harm (*i.e.*, the secreting of the monies beyond collection) and its continuing jurisdiction over the *qui tam* settlement.

knew to be false – that she was fired in retaliation.[3] She knew the claim to be false because, for among other reasons, she knew that she had attempted to falsely alter corporate minutes (the February 7, 2002 Enterprise Board meeting minutes), which was a legitimate reason to fire her and one of the most significant reasons given by the attorneys who recommended her termination to the Board of Directors. She also knew or should have known that her conduct as to the minute tapes and minutes was important to the Board's decision because she was suspended after Metropolitan's attorneys learned of the attempted alterations, because she and her lawyers were questioned about the attempted alterations of the minutes and the whereabouts of the tapes during her suspension, and because her termination followed after the investigation of the minutes alterations. (*See* Dkt. No. 133, 6-7.) She also knew this during the early part of the suit because of court filings and discussions among counsel. (*See id.* and Defs.' Reply Br., 12 n.9.)

As noted in the prior Opinions, the substance of Scott's misconduct was eventually documented beyond dispute in the litigation of this suit (because a complete transcript of Board minutes was eventually disclosed by Plaintiff's counsel for the purpose of making some points in briefing), but not before Defendants spent very substantial resources to flush out the truth from Scott (while also spending

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[3] Because of the truly extensive nature of the prior proceedings, the Court includes by reference its prior Opinions of June 23, 2005 (summary judgment Opinion) and September 29, 2005 (sanctions liability and costs Opinion).

substantial resources countering many other factual contentions by Scott concerning her workplace conduct and otherwise defending the suit). In the course of the suit, Scott filed false affidavits and failed to disclose crucial evidence (the complete tapes of the Board meeting) as well as other taped recordings of covertly recorded conversations. The non-disclosure of the minutes tapes has now been admitted by Scott, though blamed upon a paralegal who has no detailed explanation for making the critical "mistake"[4] of not disclosing the complete recordings.[5]

Plaintiff's conduct throughout the suit has been to deny secret wrongdoing, until confronted with undeniable evidence of it. In a word, she has not displayed any semblance of self-responsibility or remorse concerning either her wrongful workplace conduct or her wrongful litigation conduct which concealed her wrongful workplace conduct. Leniency in sanction is not advised by the conduct of Mary Scott nor the precepts of justice.

In light of such, the Court determined by Opinion and Order of September 29, 2005 that Plaintiff Mary

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[4] The Court does not believe this convenient and unsubstantiated scapegoating of the paralegal when the non-disclosure happened in the context of a suit in which Scott had deliberately concealed other evidence and filed deliberately false affidavits. However, even if the Executive Minutes tapes were not disclosed due to accident of the paralegal, this hardly excuses Scott, who had ample reason to know of the non-disclosure throughout the suit.

[5] *See* Notice of Withdrawal (Dkt. No. 634) and Order withdrawing Motion for Reconsideration (Dkt. No. 640).

Scott was liable for Defendants' attorney fees and expenses[6] under both court rule and the Court's inherent authority to sanction wrongful and bad faith litigation conduct. The determination of attorney fees expressly excluded fees incurred by Defendants in defending the *qui tam* portion of the suit, which was not frivolously maintained. Since the determination of liability, Defendants has moved for an award of attorney fees and expenses in the amount of $1,609,713.80.[7] This figure is substantially less than the services actually performed since counsel initially discounted their billings to Defendants by some $141,197.86. (*See* Defs.' Br. in Supp., Ex. B & B-1.) This amount is also actually much less than the amounts which were billed Defendants for defending the retaliation suit. Due to a strategic decision to keep certain time records privileged pending appeal,

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[6] The same Order established Defendants' right to $18,966.40 in statutory costs, which issue, having been previously decided, is not presently before the Court.

[7] Defendants' initial Motion requested even more fees, $1,675,672.87 (Dfs.' Br. in Supp. 14), but was then reduced with the filing of Defendants' Reply Brief (Defs.' Reply Br. 13.) This requested amount does not include statutory costs which were previously awarded. (*Id.*) The reason for the reduction is that Defendants have determined, to save both their own resources and court resources, to avoid a line-by-line fight over which entries in Plaintiff's Response, Exhibit A are properly regarded as related to the retaliation case (compensable) versus related to the *qui tam* suit (non-compensable). (*See* Defs.' Reply Br. 1.) This accounts for the $65,959.07 difference. (*See id.*) Most of this difference relates to hours billed by the Rhoads McKee law firm, though 14.9 hours of the billings were billed by the Epstein Becker law firm. (*See* Pl.'s Resp., Ex. A.)

Defendants have not sought reimbursement of over $227,000.00 of fees and costs which were actually billed Defendants for legal work and costs in the litigation. (*Id.* & Defs.' Ex. C & C-1.) Finally, to avoid challenge and facilitate a decision on the attorney fees motion, Defendants have also waived an additional claim for $65,959.07 of attorney fees actually billed Defendants. (*See supra* n.7.)

Defendants' Motion is supported by a fat book of exhibits and affidavits, which document the hours spent by Defendants' attorneys and that such hours and bills of service were actually, reasonably and necessarily incurred in the litigation. *See* 28 U.S.C. § 1924. Defendants' Motion also documents that the rates were the product of a freely negotiated attorney fee agreement and that Defendants have in fact paid the hours of service for which they seek reimbursement. (Defs.' Br. in Supp. 2, 7 & Ex. D.) Because attorney Jeff Fraser (Defendants' usual counsel) was destined to be a witness in this case, he and his law firm (Varnum Riddering Schmidt & Howlett) did not act as litigation counsel in this suit. That job was left to the able hands of Bruce Neckers and other partners, associates and legal assistants of Rhoades McKee P.C.

Attorney Bruce Neckers is a past president of both the Grand Rapids Bar Association, the Western District of Michigan Federal Bar Association and the Michigan Bar Association. He has a well-earned reputation as a fine trial advocate and has participated in many federal actions before this District. Other attorneys defending the file were: Mary Ann Cartwright (a senior employment law specialist); John

Lichtenberg (litigation partner, admitted in 1980); Mary Tabin (admitted in 1998); Anthony Pearson (admitted in 1998); LaRissa Hollingsworth (admitted in 2003); and Matthew Van Dyke (admitted in 2004). These attorneys billed at their customary rates, which rates[8] are consistent with the prevailing local market rates considering the attorneys' experience and expertise. (*See* Defs.' Br. in Supp., Ex. E-1 & E-2 (market rate surveys).) Defendants also judiciously used the services of both law clerks and legal assistants and billed those services according to those persons' customary hourly rates, which rates are consistent with the local market rates for law clerks and paralegals. This large defense team was required because of the size of the suit (10 million dollars) and the factual and legal complexity of the claims and defenses.

Defendants have also sought reimbursement as part of the totals discussed above some $95,126.82 of fees for attorney services of the law firm--Epstein

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[8] The Rhoades McKee blending rate for all attorneys was $188/hour. The blended rate combines the attorneys individual rates which vary from a high for Bruce Neckers of $300/hour to a low of $150/hour for Matthew Van Dyke. (Defs.' Br. in Supp., Ex. B, B-2 & B-3.) Defendants also billed services for clerks and legal assistants ($90/hour for clerks and $90/$100 hour for legal assistants with the exception of paralegal time for Mr. Clifford which was billed at a higher rate due to his tax expertise). The Court finds that all such rates were reasonable and consistent with market rates in the community. The Court also finds that the use of paralegals and clerks to perform research and administrative functions was an efficient and cost effective use of resources which should be compensated.

Becker & Green, P.C. (less the hours Defendants have conceded in reply, *see supra* n.4). (Defs.' Br. in Supp., Ex C & C-1.) As noted, this amount has been discounted from Defendants' actual paid attorney fees incurred in connection with the retaliation case. (*See id.*) The Epstein Becker billings each related to the retaliation case.

The blended rate for these fees is much higher – $324/hour[9] --because these attorneys are specialists in health carelegal compliance issues (Medicare, Medicaid, *etc.*) and offer services which are not widely available in the Grand Rapids market (particularly since Defendants' general counsel could not continue in the litigation). Those rates are reasonable rates for the Washington, D.C. market where the firm is located. The blended rate is based on attorney fee rates as high as $550/hour for Carrie Valiant as well as much lower attorney rates. Carrie Valiant demands a high rate in the market place because of special expertise in the area of health care law. (*See* Dkt. No. 571, 16.) The billings also reflect that the law firm effectively managed work assignments in that research tasks were performed by less experienced attorneys and lesser administrative tasks, such as document collection and review, were performed by legal assistants. (*See* Defs.' Br. in Supp., Ex. C, C-1 & C-3.)

The D.C. law firm was required to defend the retaliation case because Plaintiff sought to introduce compliance issues into the proofs of her retaliation

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[9] *See* Defs.' Br. in Support, Ex. C-3.

case. Plaintiff did so repeatedly and sought to appeal discovery orders and *in limine* orders regarding compliance issues by interlocutory appeal.

LEGAL STANDARDS PERTAINING TO "BAD FAITH" AWARDS

As noted in the Court's Opinion and Order of September 29, 2005, there are three bases for assessing liability against Plaintiff Mary Scott: inherent authority, Federal Rule of Civil Procedure 26(g) and Rule 56(g). Of these, inherent authority is obviously the most important because it touches all of Plaintiff's bad faith conduct during the litigation. A limited award under Rules 26 and 56 would not do justice to the magnitude of the offense.

Inherent authority "bad faith" awards are thankfully rare events in the federal courts, but have proven necessary to prevent wholesale abuse of justice. In 1975, the Supreme Court decided a famous case, *Alyeska Pipeline Serv. Co. v. The Wilderness Soc.*, 421 U.S. 240 (1975), whose main premise was that the American rule (each side pays its own attorney fees and expenses) is still a predominant feature of our common law legal system. While saying so, the Supreme Court (Justice White) took pains to observe exceptions to that rule, including the inherent authority exception for cases in which the losing party has acted in bad faith in the litigation. *Id.* at 529. One of the cases cited by Justice White for the exception was *Vaughan v. Atkinson*, 369 U.S. 527 (1962). In *Vaughan*, the Supreme Court approved the award of attorney fees against bad faith respondents in a "maintenance and cure" case. It did so despite the fact

that the common law "maintenance and cure" doctrine did not include any such award, because if the award were not made in a case in which the right to "maintenance and cure" were clear (*i.e.*, when the respondents were not paying for bad faith reasons), then the effectiveness of the remedy would be undermined. *See id.* at 533-34.

Justice White returned to the subject of the federal court's inherent authority to award attorney fees and expenses in the case of *Chambers v. NASCO, Inc.* 501 U.S. 32, 56-58 (1991), which affirmed an award of attorney fees and expenses in excess of one million dollars.[10] In doing so, the Supreme Court reached beyond the limited rule authority to sanction repeated bad faith conduct by a litigant and counsel. Justice White's words bear repeating:

> *Chambers* maintains that 28 U.S.C. § 1927 and the various sanctioning provisions in the Federal Rules of Civil Procedure[11] reflect a legislative intent to displace the inherent power. At least, he argues that they obviate or foreclose resort to the inherent power in this case. We

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[10] The attorney fees and expenses awarded and affirmed by the Supreme Court in *Chambers*, plus appeal fees, were more than one million dollars and amounted to all of *NASCO*'s litigation expenses. *See Chambers*, 501 U.S. at 40; *NASCO, Inc. v. Calcascieu Telev. & Radio, Inc.*, 894 F.2d 696, 701 (5th Cir. 1990).

[11] The *Chambers* Court considered some of the same sanction provisions applicable in this suit, but determined that such provisions by themselves may not provide sufficient remedy. *See Chambers*, 501 U.S. at 42 n.8.

agree with the Court of Appeals that neither proposition is persuasive. . . .

It has long been understood that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution," powers "which cannot be dispensed with in a Court, because they are necessary to the exercise of all others." *United States v. Hudson,* 7 Cranch 32, 34, 3 L.Ed. 259 (1812); see also *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 764, 100 S. Ct. 2455, 2463, 65 L.Ed.2d 488 (1980) (citing *Hudson*).[12] For this reason, "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." *Anderson v. Dunn,* 6 Wheat. 204, 227, 5 L.Ed. 242 (1821); *see also Ex parte Robinson,* 19 Wall. 505, 510, 22 L.Ed. 205 (1874). These powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co.,* 370 U.S. 626, 630-631, 82 S. Ct. 1386, 1388-1389, 8 L.Ed.2d 734 (1962). . . .

There are other facets to a federal court's inherent power. The court may bar from the

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[12] The holding in *Roadway Express* authorized inherent authority sanctions for bad faith discovery conduct as well as other related bad faith conduct, though it remanded for a finding as to bad faith.

courtroom a criminal defendant who disrupts a trial. *Illinois v. Allen,* 397 U.S. 337, 90 S. Ct. 1057, 25 L.Ed.2d 353 (1970). It may dismiss an action on grounds of *forum non conveniens, Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 507-508, 67 S. Ct. 839, 842-843, 91 L.Ed. 1055 (1947); and it may act *sua sponte* to dismiss a suit for failure to prosecute, *Link, supra,* 370 U.S., at 630-631, 82 S. Ct., at 1388-1389.

Because of their very potency, inherent powers must be exercised with restraint and discretion. *See Roadway Express, supra,* 447 U.S., at 764, 100 S. Ct., at 2463. A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process. As we recognized in *Roadway Express,* outright dismissal of a lawsuit, which we had upheld in *Link,* is a particularly severe sanction, yet is within the court's discretion. 447 U.S., at 765, 100 S. Ct., at 2463. Consequently, the "less severe sanction" of an assessment of attorney's fees is undoubtedly within a court's inherent power as well. *Ibid. See also Hutto v. Finney,* 437 U.S. 678, 689, n. 14, 98 S. Ct. 2565, 2573, n. 14, 57 L.Ed.2d 522 (1978).

Indeed, "[t]here are ample grounds for recognizing... that in narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel," *Roadway Express, supra,* 447 U.S., at 765, 100 S. Ct., at 2463, even though the so-called "American Rule" prohibits fee shifting in most cases. *See Alyeska Pipeline Service Co. v.*

Wilderness Society, 421 U.S. 240, 259, 95 S.Ct. 1612, 1622, 44 L.Ed.2d 141 (1975). As we explained in *Alyeska*, these exceptions fall into three categories. The first, known as the "common fund exception," derives not from a court's power to control litigants, but from its historic equity jurisdiction, . . . , and allows a court to award attorney's fees to a party whose litigation efforts directly benefit others. *Alyeska*, 421 U.S., at 257-258, 95 S. Ct., at 1621-1622. Second, a court may assess attorney's fees as a sanction for the " 'willful disobedience of a court order.' " *Id.*, at 258, 95 S. Ct., at 1622 (quoting *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718, 87 S. Ct. 1404, 1407, 18 L.Ed.2d 475 (1967)). Thus, a court's discretion to determine "[t]he degree of punishment for contempt" permits the court to impose as part of the fine attorney's fees representing the entire cost of the litigation. *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 428, 43 S. Ct. 458, 466, 67 L.Ed. 719 (1923).

Third, and most relevant here, a court may assess attorney's fees when a party has " 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.' " *Alyeska, supra*, 421 U.S., at 258-259, 95 S.Ct., at 1622-1623 (quoting *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129, 94 S. Ct. 2157, 2165, 40 L.Ed.2d 703 (1974)). *See also Hall v. Cole*, 412 U.S. 1, 5, 93 S. Ct.1943, 1946, 36 L.Ed.2d 702 (1973); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, n. 4, 88 S.Ct. 964, 966, n. 4, 19 L.Ed.2d 1263 (1968) (per

> curiam). In this regard, if a court finds "that fraud has been practiced upon it, or that the very temple of justice has been defiled,"it may assess attorney's fees against the responsible party, *Universal Oil, supra,* 328 U.S., at 580, 66 S. Ct., at 1179, as it may when a party "shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order." *Hutto*, 437 U.S., at 689, n. 14, 98 S. Ct., at 2573, n. 14. The imposition of sanctions in this instance transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself, thus serving the dual purpose of "vindicat[ing] judicial authority without resort to the more drastic sanctions available for contempt of court and mak[ing] the prevailing party whole for expenses caused by his opponent's obstinacy." *Ibid.*

Chambers, 501 U.S. at 42-47 (footnotes omitted).

In light of *Chambers*, the Sixth Circuit has in appropriate cases upheld the assessment of "inherent authority" attorney fees against "bad faith" actors. *See First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 526 (6th Cir. 2002); *Mann v. Univ. of Cincinnati*, 1997 WL 280188, **8 (6th Cir. May 27, 1997). Indeed, some Sixth Circuit authority even expands the "inherent authority" powers to cases "tantamount to bad faith." *See Grinnell Brothers, Inc. v. Touche Ross & Co.*, 655 F.2d 725, 727 (6th Cir. 1981); *Banner v. City of Flint*, 99 Fed. Appx. 29, 37-38 (6th Cir. Apr. 8, 2004).

Before the assessment of "bad faith" sanctions, the parties must be afforded adequate notice and opportunity to be heard (though not necessarily a full evidentiary hearing). *Wilson-Simmons v. Lake County Sheriff's Dep't*, 207 F.3d 818, 822 (6th Cir. 2000) (citing *Cook v. American S.S. Co.*, 134 F.3d 771, 774-75 (6th Cir. 1998)). The requirement of "notice and opportunity to be heard," however, must be reconciled with the Supreme Court's admonition in *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), that attorney fee assessment not become "a second major litigation." *See also Black v. Lojac Enter., Inc.*,1997 WL 377051, **5 (6th Cir. July 2, 1997) (following *Hensley*). In the instant case, the parties have been afforded "notice and opportunity" in the form of briefing of multiple motions specifically relating to the liability and amount of "bad faith" sanctions.

In assessing the attorney fee billings, the Court must apply the words of the Sixth Circuit in *Wooldridge v. Marlene Indus. Corp.*, 898 F.2d 1169, 1173 (6th Cir. 1990), which recognized that the pertinent question in assessing attorney fees:

> [I]s not whether a party prevailed on a particular motion or whether in hindsight the time expenditure was strictly necessary to obtain the relief achieved. Rather, the standard is whether a reasonable attorney would have believed the work to be reasonably expended in pursuit of success at the point in time when the work was performed.

Id. at 1177.

LEGAL ANALYSIS

As indicated above, this Court has previously found Plaintiff's litigation conduct in this suit to have been in "bad faith" due to her pursuit of the factually baseless retaliation claim as part of a multi-million dollar lawsuit, the intentional concealment of multiple tape recordings, including the crucial minutes tapes, and the filing of intentionally false affidavits on the minutes issue. The filing and litigation of the retaliation claim was, in light of this record, motivated by an "improper purpose" to harass and extort Plaintiff's former employer. *See First Bank of Marietta*, 307 F.3d at 524 (citing *Big Yank. Corp v. Liberty Mut. Fire Ins. Co.*, 125 F.3d 308, 314 (6th Cir. 1997)). In short, this was a case, like *Chambers* and *First Bank of Marietta*, that was long brewed and fermented in the liquor of "bad faith."

As with other cases of this type, the amount of those sanctions, as noted in *Chambers*, must be directed toward the twin objectives of both punishing the wrongdoing (so that it is not repeated) and providing some measure of compensation to those parties victimized by it. Because "bad faith" attorney fees derive from the Court's broader "inherent authority," the assessment of those fees is not limited by the procedural and statutory authorities pertinent to other attorney fee assessments. *See Chambers*, *supra*; *First Bank of Marietta*, 307 F.3d at 517. This is advisable because, since the court rules operate in conjunction with one another, a violation of multiple rules may have the tendency to make the enforcement of many aspects of the rules unjust. For example, a party opposing a frivolous pleading cannot comply with

the "safe-harbor" provision of Federal Rule of Civil Procedure 11(b)(1)(A) when the opposing party has concealed evidence in violation of Rule 26 and has filed false affidavits in violation of Rule 56.

In light of the record, the Court finds, consistent with its prior Opinions and Orders, that the appropriate assessment of attorney fees should reflect the reasonable and actual attorney fees and expenses incurred by Defendants in defending the retaliation claim and the supplemental claims (but excluding the defense of the *qui tam* claims). The Court finds that both the rates and hours charged by Defendants' attorneys and support staff members were reasonable (with slight exceptions noted below)[13] and were actually and necessarily incurred in this suit. The Court further finds that the limited use of the Epstein, Becker & Green law firm was reasonable given the need for out-of-town counsel on those issues, that those rates were reasonable given the services required, and that the hours billed were reasonably, actually and necessarily incurred in this suit. The Court believes that the legal expenses so incurred (including fees for travel, use of legal service databases, *etc.*) were actually, necessarily and reasonably incurred in this suit. Therefore, the Court determines that attorney fees and costs should be awarded in favor of

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[13] Referring to Pl.'s Exs. A & G and two entries on Ex. D of Pl.'s Resp.

Defendants and against Plaintiff in the amount of $1,608,268.80.[14]

While the case law does not require that this Court show that the fees and expenses are recoverable under a "lodestar" analysis, nevertheless, as an illustration of their reasonableness, the fees and expenses at issue are recoverable under a lodestar analysis. The rates at issue are reasonable and consistent with the applicable market rates for attorneys with like experience and skill. The hours worked were necessary to defense of the retaliation suit.

Such amount is preeminently reasonable in light of the so-called *Johnson* factors:

> To aid in determining a lodestar fee and to adjust or enhance a lodestar fee, the district court is also permitted to consult a number of factors specified in the Fifth Circuit case of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). These factors include:
>
> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the

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[14] The Court has studied the thick billing exhibits for other examples of excessive or unnecessary hours in vain. The absence of such hours is a tribute to the attorneys' parsimony in not billing excessive or unnecessary hours (with the slight exceptions already noted).

> customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.
>
> *Blanchard v. Bergeron*, 489 U.S. 87, 91 n. 5, 109 S. Ct. 939, 103 L.Ed.2d 67 (1989) (citing with approval *Johnson*); *see also Paschal v. Flagstar Bank*, 297 F.3d 431, 434-35 (6th Cir. 2002) (same).

Holford v. Exhibit Design Consultants, 218 F. Supp. 2d 901, 910 (W.D. Mich. 2002). In this case, the first, third, fourth, eighth, ninth and eleventh factors (as well as the balance of all factors) militate in favor of recovery of the lodestar fee and might even warrant an enhanced fee. While the Court does not believe that an enhanced fee is necessary for the objectives of either punishment (including deterrence) or compensation, the suggestion of the *Johnson* factors nevertheless strongly supports an award of the fee sought by Defendants.

In the course of briefing, Plaintiff has also raised a number of particular objections to the assessment of the monetary sanction, which are summarized in the exhibits filed with Plaintiff's Response. Plaintiff's first objection, explained in Pl.'s Ex. A, to $65,959.07 of fees was conceded by Defendants and need not be addressed. *See supra* n.7. Plaintiff's second objection

concerns some $21,415.81 of fees for services performed by the attorneys during the retaliation suit relating to legal compliance matters (as asserted in Pl.'s Ex. B). As noted above, those fees were necessary and reasonably incurred because Plaintiff attempted to insert legal compliance matters into the retaliation proofs. In light of such, Defendants had no choice but to expend resources on this issue. Those fees are properly compensated.

Plaintiff's third objection (outlined in Pl.'s Ex. C) is that Defendants should not be compensated for $41,140 of fees incurred in connection which the state law claims, which were dismissed without prejudice. This objection is flawed in several respects. Some of the fees included in Exhibit C relate to the retaliation claim and not the state law claims, *e.g.*, the research and evaluation of *res judicata* related to the binding effect of the dismissal of the *qui tam* claims on the federal retaliation claim. As to those entries which relate only to the state law claims, the Court finds that Defendants are properly compensated for them. It has been settled law since the decision in *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966), that federal courts, upon dismissal of federal claims, generally dismiss state law claims for comity reasons. Given such, when a single baseless federal claim is asserted together with pendent state law claims, the filer of the claim has every reason to know that the assertion of the federal claim will cause a simple waste of resources in connection with the state law claims (which must be defended, but will ultimately be decided in another court). Given such, legal expenses incurred in connection with those claims are properly compensated even if the claims have some merit. In the present

case, there is no rationale for not compensating the defense for the state law claims both because jurisdiction was pinned upon a single baseless federal law claim and the state law claims were themselves baseless (though such was determined in *dicta* to permit the exercise of comity by the state courts).

Plaintiff has also objected to $3,175.50 of legal services itemized in Exhibit D. The services appear for the most part to be legitimate attorney services in connection with the retaliation claim. For example, research and processing of a Freedom of Information Act request under Texas law pertained to valuable work history information concerning one of Plaintiff's prior employers. Such research and investigation are properly compensable because they are the kinds of work routinely and prudently done by competent counsel and are generally compensable in the relevant market. However, two entries on Exhibit D are not compensable. There is an entry for one hour of software training ($195) for Anthony Pearson which (though it should have been grouped with Exhibit G) is not allowable for the reasons given in the next paragraph. The other entry to be disallowed is a two tenths of one hour entry by Bruce Neckers regarding client consultation as to a mid-suit press release. While the Court believes that such consultations are important attorney services (because otherwise a client might frustrate the client's defense by an untimely or inaccurate statement), such services are generally better described as relating to the client's own marketing and professional development purposes as opposed to success in the suit (which could otherwise be achieved by making no statements to the media). As such, the consultation ($60) will be disallowed because

it was not essentially related to the defense of the suit.[15] *See Halderman by Halderman v. Pennhurst State Sch. & Hosp.*, 49 F.3d 939, 942 (3d Cir. 1995); *Hart v. Bourque,* 798 F.2d 519, 523 (1st Cir. 1986); *Greater Los Angeles Council on Deafness v. Cmty. Telev. of S. Cal.,* 813 F.2d 217, 221 (9th Cir. 1987); *Watkins v. Fordice*, 7 F.3d 453, 458 (5th Cir. 1993); *Assoc. Builders & Contractors of La., Inc. v. Orleans Parish Sch. Bd.*, 919 F.2d 374, 380 (5th Cir. 1990); *In re Meese*, 907 F.2d 1192, 1203 (D.C. Cir. 1990); *Am. Petroleum Inst. v. U.S. E.P.A.*, 72 F.3d 907, 913 (D.C. Cir. 1996).

Plaintiff has objected to $1,190 in attorney services performed by Defendants' attorneys in connection with training for use of trial electronic evidence software. It appears that this suit was the impetus for the training, but that the training will be generally transferable to later suits tried by the attorneys. While the Court agrees that such training efforts are laudatory and helpful in large litigation efforts such as the present case, the Court agrees with Plaintiff's position that such efforts are not generally compensable as attorney fees. In saying so, the Court acknowledges the federal case law which broadly construes recoverable attorney

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[15] The Court could foresee a case (one involving heavy media statements by the opposing side) in which press releases and media interviews were essential attorney services in defense of the suit (to avoid pre-suit jury persuasion). However, this is not such a case. *Cf. Davis v. San Francisco,* 976 F.2d 1536, 1545 (9th Cir. 1992), *vacated in part on other grounds,* 984 F.2d 345 (9th Cir. 1993). Also, the review of media statements by an opponent is proper investigation in connection with a suit. *See Meese*, 907 F.2d 1203 n.19.

fees to include both standard litigation expenses, legal assistant fees and other fees which are routinely billed to paying clients. *See Missouri v. Jenkins*, 491 U.S. 274, 288-89 (1989); *Norcross v. Bd. of Educ. of Memphis City Sch.*, 611 F.2d 624, 639 (1979). However, the training hours at issue (precisely because they are generally transferable) are not the kinds of attorney fee hours which, in the Grand Rapids and West Michigan markets, are generally billable to a fee paying client. *See, e.g., Richards v. Sec'y of Health & Human Serv.*, 884 F. Supp. 256, 260 (N.D. Ohio 1995) (disallowing training time as recoverable fees); *Surge v. Massanari*, 155 F. Supp. 2d 1301, 1305 (M.D. Ala. 2001) (same). Therefore, those fees will be disallowed.

In addition to Plaintiff's objections to specific billing items, Plaintiff has made several objections to the assessment of attorney fees and expenses. One such objection is to the billing of legal assistant and law clerk services. These same objections have previously been rejected by both the Supreme Court in *Jenkins* and this Circuit in *Norcross*, since those Courts properly understood that the billing of such time is a cost-effective use of resources and overall reduces the charges for attorney services. That objection (including the characterization that some of the time should be attributed to "training") is, therefore, overruled.

Plaintiff has made a general objection that Defendants unnecessarily multiplied fees by not seeking earlier dismissal/summary judgment in the suit. This is a truly perverse argument because Plaintiff (by withholding discovery and lying in her affidavits) was the essential reason why Defendants could not obtain earlier dismissal of the suit. As soon

as Plaintiff filed the complete affidavit of the taped meeting, Defendants pounced on the information and obtained summary judgment as quickly as was practicable. The objection is overruled.

Plaintiff has also made a general objection that no fees should be assessed because she has been punished enough by public humiliation in the suit, her own lawyer fees, by her diminished employment prospects and by the loss of an adoption which, according to Plaintiff, was withdrawn after her conduct was documented by the Court. These injuries, if they have occurred, are self-inflicted and are not the consequence of court sanction. The Court does not believe that such self-inflicted injury is an effective deterrent for Plaintiff, particularly in the absence of any acknowledged remorse for past wrongful conduct and particularly in light of the wholesale litigation misconduct which is the subject of this sanction.[16] Further, the Court believes that the failure to recompense Defendants (who include a not-for-profit

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[16] Plaintiff has also cited the rule in *Danvers v. Danvers*, 959 F.2d 601, 605 (6th Cir. 1992) for the proposition that the sanction imposed should be the "minimum necessary" to dissuade future misconduct. This is a correct reading of *Danvers* and the case of *Jackson v. Law Firm*, 875 F.2d 1224, 1229-30 (6th Cir. 1989), on which *Danvers* relied. However, both cases were interpretations of Rule 11, which is now written to include such limitation. That limitation does not directly apply to "inherent authority" sanctions. However, even assuming it applied, the sanctions discussed herein are proper because the Court is convinced that no amount of sanction is sufficient to deter Plaintiff from future misconduct and that the other pertinent factor (the need for compensation) weighs out as most significant.

health corporation whose very existence was threatened by this suit) for the large costs of a frivolously and vexatiously maintained suit would be wholly unjust and inconsistent with the holdings of such cases as *Chambers* and *First Bank of Marietta*. This is particularly so since those fees have already been reduced and do not represent the complete defense costs of the retaliation suit.

To the extent that Plaintiff claims that a large award should not be made because she has limited resources, the Court rejects such argument because the extent of Plaintiff's resources have not been sufficiently documented nor have Defendants yet had discovery on this issue (which usually occurs only post-suit). Also, Defendants rightly question Plaintiff's assertions given certain information known to them about sizable real estate holdings (a million dollar property in the Grand Rapids area and two expensive homes near Birmingham, Michigan). (*See infra* and Defs.' Reply Br. 13.)

Having, therefore, determined that Defendants' Motion should be granted in part and denied in part, a judgment for attorney fees shall issue in favor of Defendants and against Plaintiff in the amount of $1,608,268.80.

SETOFF

Defendants have also applied to setoff its judgment for attorney fees against the monies owed by them to Plaintiff under the *qui tam* Settlement Agreement. The principle of setoff (an old one from the common law) is that if A owes B a liquidated debt and B owes

A a liquidated debt, only the net debt need be paid. This practice "avoid[s] the absurdity of making A pay B when B owes A." *In re Malinowski,* 156 F.3d 131, 133 (2nd Cir. 1998). The right of setoff has long been recognized by both federal and state courts. *See, e.g., Nat'l City Bank, N.W. v. Columbian Mut. Life Ins. Co.*, 282 F.3d 407, 409 (6th Cir. 2002); *In re Larbar Corp.*, 177 F.3d 439, 447 (6th Cir. 1999); *Parker Motor Freight, Inc. v. Fifth Third Bank* , 116 F.3d 1137, 1141 (6th Cir. 1997); *Whispering Pines AFC, Home, Inc. v. Dep't of Treasury,* 538 N.W.2d 452, 456 (Mich. Ct. App. 1995).

Setoff issues are typically determined under the state law of the place where the operative facts took place.[17] *In re Britton*, 83 B.R. 914, 918 (Bankr. E.D. N.C. 1988); *Williams v. Am. Bank of the Mid-Cities, N.A.*, 61 B.R. 567, 571 (Bankr. N.D. Tex. 1986). In this case, although the judgment for attorney fees is best regarded as a debt incurred under federal law, the federal common law for the exercise of setoff as to such a judgment debt is not meaningfully distinguishable from Michigan law.

Under Michigan law, the exercise of setoff rights is a matter of equity which is to be left to the trial court's considerable discretion. *Walker v. Farmers Ins. Exch.*, 572 N.W.2d 17, 19 (Mich. Ct.App. 1997) (citing cases); *Blum v. Weinberg*, 2003 WL 1879936, *5 (Mich. Ct. App. 2003). The operation of setoff is well illustrated

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[17] One notable exception are cases wherein a federal statute provides either a special statutory setoff right or otherwise limits the exercise of setoff rights under state law.

by an older decision of the Michigan Supreme Court. In *Smith v. Curtiss*, the Michigan Supreme Court held as follows:

> The court found that the amount of plaintiff's claim in this action was $266.48 and the amount of defendant's set-off was $135.83, and that a proper tender of the difference between said demands was made at the commencement of this suit and still kept good. Under this finding the plaintiff will be entitled to a judgment for $130.65, and the defendant will be entitled to recover costs in the justice's court, the circuit and in this court, and deduct the amount thereof from the amount of the plaintiff's judgment.

Smith v. Curtiss, 38 Mich, *1 -2 (Mich. 1878). In other words, the *Curtiss* Court applied two setoffs. First, it setoff the mutual pre-judgment debts. Second, it setoff the costs owed because of the unnecessary litigation of the suit against the plaintiff (who was otherwise owed the balance of the debts).

Defendants' request for relief is made compelling by two recent large financial transactions by the Scott family (Mary Scott and her husband). Defendants have discovered that the Scotts recently moved into a $500,000 home in Birmingham, Michigan and purchased a second home for $290,000 in the name of Mark Scott only. (Defs.' Reply Br. 9.) These recent large purchases suggest that the Scotts may be

transferring assets to defeat judgment collection.[18] Although Plaintiff has characterized these transactions differently in her Sur-Reply Brief, even acknowledging her different characterizations, there is still substantial reason to believe that the Scott family

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[18] Under Michigan law, execution must be levied against personalty first and only secondarily against realty. *See* Mich. Comp. Laws § 600.6017. Realty which is owned by the entireties is protected from levy except for joint debts. *See* Mich. Comp. Laws § 600.2807(1). Execution also would not be possible against real estate held only in the name of Mark Scott since he is not a judgment debtor. If it could be proven that transfers were made to defeat creditors, then transactions might be unwound, *see* Mich. Comp. Laws § 566.16, though sometimes the effort of unwinding such transactions proves a practical impediment to collection.

members are making large real estate transactions, in part, to avoid collection.[19]

Plaintiff does, however, rightly object that the right of setoff is not applicable in this case because Defendants do not owe money directly to her, but instead owe money to the United States and the United States itself owes a portion of the money to Plaintiff. *See United States v. American Prod. Indus., Inc.*, 58 F.3d 404, 408 (9th Cir. 1995). This is true and is a sufficient reason for declining the setoff of funds *per se*. It is not a sufficient reason, however, for not

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[19] Plaintiff has filed an expired one-year lease document covering the $500,000 residence which shows that she did not own it (but paid $26,400) in rent for the one-year period expiring in October 2005. It appears that she is still living at that residence and has not disclosed by sworn statement the nature of her current interest (whether ownership or lease). She has also taken issue with the fact that her Caledonia property is worth $1 million (the sale price), given the S.E.V. is $758,200. Of course, neither the sale price or the S.E.V. is conclusive and the market value is probably somewhere in between. There is no dispute, though, that Mary Scott and Mark Scott presently own the Caledonia residence, while Mark Scott has just purchased another substantial Birmingham property only in his name, and while the couple is either paying an expensive lease for the third property or purchasing it. Any way you slice it, this is a large amount of funds placed into real estate which will be difficult if not impossible to recover by levy or execution at a time when Plaintiff has impending substantial liabilities.

employing other equitable remedies permitted under Michigan law.[20]

Plaintiff has also argued that under the False Claim Act, her receipt of the 18-percent statutory percentage is protected against setoff or other claim for indemnification by the *qui tam* Defendants. This proposition is true as it relates to claims that Defendants might have (for setoff, contribution and the like) against Plaintiff for legal violations by her which gave rise to the False Claims Act allegations. *See Mortgages, Inc. v. U.S. Dist. Court for Dist. of Nev.*, 934 F.2d 209 (9th Cir. 1993); *United States ex. rel. Madden v. Ge. Dynamics Corp.*, 4 F.3d 827, 830-31 (9th Cir. 1993). However, this does not mean (and cannot mean if justice is to be done) that *qui tam* assets are protected from seizure for unrelated claims arising after the *qui tam* events (in this case litigation abuses). The Court holds that there is no legal impediment preventing the seizure of Plaintiff's *qui tam* award funds to be applied to the attorney fees judgment in favor of Defendants.

While setoff is not permitted, Michigan law permits a broad array of supplemental and equitable collection remedies under Michigan Compiled Laws § 600.6104. *In re John Richards Homes Bldg. Co.*, L.L.C. 298 B.R. 591, 609 (Bkrtcy. E.D.Mich. 2003). Such remedies are available as part of the Court's equity jurisdiction whenever it is shown on the balance that the following

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[20] Under Federal Rule of Civil Procedure 64, the procedures for execution and other satisfaction of judgment are those of the law of the forum state.

factors favor injunctive relief: (1) justice requires the granting of an injunction; (2) there is no adequate remedy at law; and (3) there is a real and imminent danger of irreparable harm. *Acer Paradise, Inc. v. Kalkaska County Rd. Comm'n*, 684 N.W.2d 903, 910 (Mich. Ct. App. 2004); *Penninsula Sanitation v. City of Manistique*, 526 N.W.2d 607, 611 (Mich. Ct. App. 1994).

Each of the above factors supports equitable relief in this matter. The attorney fees award is made only because of widespread bad faith conduct by Plaintiff. It would be fundamentally unfair to issue such a judgment and permit it to be undermined by collection avoidance. There is no adequate remedy at law if Plaintiff is permitted to obtain the monies and then transfer those monies to the form of exempt assets; such collection avoidance would impose upon Defendants, at the very least, the substantial costs of attempting to vacate such transactions and may as a practical matter defeat any attempt to obtain those monies. Finally, there is a real and imminent danger of such harm. Plaintiff's conduct in this suit has been disreputable and it would be foolish to expect something else in the future. The recent real estate transactions (though possibly legitimate), suggest a real and imminent danger of fraudulent collection avoidance activities within the meaning of Michigan Compiled Laws § 566.16, which might completely undermine an attempt to obtain repayment of the 18-percent *qui tam* funds. As such, an appropriate order should issue under Michigan Comiled Laws § 600.6104(3) & (5) to prevent disbursement of the non-exempt funds.

What kind of order should issue? This question was answered in the case of *Rogers v. Webster*, 779 F.2d 52, 1985 WL 13788, *2 (6th Cir. 1985). Therein, the Sixth Circuit upheld an order of the district court under Mich. Comp. Laws § 600.6104(3) & (5) which required the payment of non-exempt property to the Court's clerk for later distribution to the judgment creditor.[21] The Court will approve a like order in this case to prevent fraudulent collection avoidance. As noted below, disbursement of the funds so deposited will be delayed in the event that Plaintiff appeals the Court's judgment and obtains approval of a proper supersedeas bond.

APPEAL BOND

Finally, there is the issue of an appeal. The issue has been raised by Defendants, though of course, it is Plaintiff who must move for the approval of a proper supersedeas bond under Federal Rule of Civil Procedure 62(d) to obtain a stay upon execution. The parties' briefing focuses on the language of Federal Rule of Appellate Procedure 7 which states that the district court "may require an appellant to file a bond . . . to ensure payment of costs on appeal . . ." Fed. R. App. P. 7. This requirement is in addition to the Rule 62(d) requirement for the posting of a supersedeas bond to cover the judgment amount. *Adsani v. Miller*, 139 F.3d 67, 70 & n.2 (2nd Cir. 1998).[22]

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[21] In *Rogers*, the district court also approved the appointment of a receiver, which has not been sought here.

[22] Sixth Circuit cases have routinely required supersedeas bonds as to appeals of substantial attorney fee awards. *See, e.g.*,

As to the "cost" on appeal component of a bond, Plaintiff is right that this Court and others have interpreted Rule 7 as limiting "costs" on appeal to those compensable under Federal Rule of Appellate Procedure 39 (*i.e.*, court fees, copying fees and the like) and as not including attorney fees which may accrue on appeal. *Donaldson v. Imperial Casualty & Indem. Co.*,1989 U.S. Dist. LEXIS 17920 (W.D. Mich. 1989) (citing *Fleschmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967); *In re American President Lines, Inc.*, 779 F.2d 714, 716 (D.C. Cir. 1985), *Baez v. United States Dep't of Justice*, 684 F.2d 999 (D.C. Cir. 1982)); *contra Adsanti*, 139 F.3d at 74. While there continues to be diverse precedent on this subject, the Court will follow its past precedent absent contrary direction from either the Sixth Circuit or the Supreme Court.

Therefore, the Court will not require a large cost bond, but will require a sufficient cost bond to cover Rule 39 costs. The Court finds that a $25,000 cost bond is sufficient to cover the costs on appeal. This amount is in addition to a sufficient supersedeas bond under Rule 62(d), which supersedeas bond should cover both the face amount of costs previously awarded ($18,966.40) plus the face amount of the attorney fees award. In other words, Plaintiff will provide reasonable security provided that the bond or bonds to be filed are not less than the total amount of $1,652,235.20. Such bond should be forwarded to the Court for approval within the 10-day automatic stay

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Kennedy v. Uniroyal Pension Plan, 937 F.2d 608, 1991 WL 134613, *8 (6th Cir. 1991).

period under Rule 62(a) to prevent execution after the 10-day period. Provided that a proper appeal bond is approved, then the Court will not disburse funds paid to the Court's registry or permit other execution or levy pending resolution of the appeal.

CONCLUSION

In accordance with the Court's Opinion of this date, a Judgment shall issue granting Defendants' Motion for Attorney Fees and Expenses in part, awarding attorney fees against Plaintiff and in favor of Defendants in the amount of $1,608,268.80, awarding Defendants further equitable relief, and requiring a sufficient bond.

/s/
RICHARD ALAN ENSLEN
SENIOR UNITED STATES DISTRICT JUDGE

DATED in Kalamazoo, MI:
December 13, 2005

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:02-CV-485

[Filed December 13, 2005]

UNITED STATES OF AMERICA, *ex rel.*. MARY SCOTT,
Plaintiff,

v.

METROPOLITAN HEALTH CORPORATION d/b/a METROPOLITAN HOSPITAL,

and

MICHAEL FAAS,
Defendants.

JUDGMENT FOR ATTORNEY FEES

In accordance with the Opinion of this date;

IT IS HEREBY ORDERED that Defedants Metropolitan Health Corporation and Michael Faas'

Motion for Attorney Fees (Dkt. No. 641) is **GRANTED IN PART AND DENIED IN PART**.

IT IS FURTHER ORDERED that a judgment for attorney fees and expenses (in addition to costs previously awarded) is entered in favor of Defendants and against Plaintiff Mary Scott in the amount of One Million Six Hundred Eight Thousand, Two Hundred Sixty-Eight Dollars and Eighty Cents ($1,608,268.80).

IT IS FURTHER ORDERED that the United States of America, upon receipt of future payments from Defendant Metropolitan Health Corporation, shall deposit future payments due Mary Scott under the *qui tam* Settlement Agreement into the Court's registry for later distribution. The deposit of those funds shall be deemed payment of Mary Scott regardless of the later disposition of those funds.

IT IS FURTHER ORDERED that the Clerk of the Court shall deposit those monies into an interest-bearing account for later distribution.

IT IS FURTHER ORDERED that, should Plaintiff appeal this Judgment, she shall comply with the Court's instructions regarding an appeal bond.

/s/ Richard Alan Enslen
RICHARD ALAN ENSLEN
SENIOR UNITED STATES DISTRICT JUDGE

DATED in Kalamazoo, MI:
December 13, 2005

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:02-CV-485

[Filed September 29, 2005]

UNITED STATES OF AMERICA, *ex rel.* MARY SCOTT, Plaintiff,	)
v.	)
METROPOLITAN HEALTH CORPORATION, d/b/a METROPOLITAN HOSPITAL, a Michigan corporation,	)
and	)
MICHAEL FAAS, an individual, jointly and severally, Defendants.	)

OPINION

This matter is before the Court on Defendants Metropolitan Health Corporation and Michael Faas'

Bill of Costs and Motion for Attorneys' Fees, Expenses, and Non-Taxed Costs as Sanction. Both Plaintiff Mary Scott and Defendants have fully briefed the pertinent issues and oral argument is unnecessary and would only protract the resolution of the matters at issue.

BACKGROUND

Defendants' Motion is both typical and atypical. The typical aspect is the Bill of Costs, which is statutorily authorized under 28 U.S.C. § 1920 and is ordered as a matter of course. The atypical aspect is the request for sanctions and expenses under Federal Rules of Civil Procedure 26(g)(3), 37(c), 56(g) and the Court's inherent authority (*see, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991)) to sanction litigation misconduct.

This Court has already written at length concerning the background of this federal retaliation case. The Court adopts by reference of its earlier Opinion, *United States ex rel. Scott v. Metropolitan Health Corp.*, 375 F. Supp. 2d 626 (W.D. Mich. 2005), to provide a framework for this discussion.

As noted in the earlier decision, the federal retaliation claim was dismissed with prejudice on June 23, 2005. This Motion was then filed in July 2005. It was filed after Plaintiff appealed the underlying Judgment, though such appeal does not deprive this Court of jurisdiction to determine attorney fee and sanction motions, which are deemed collateral to the main cause of action and the appeal. *See Buchanan v. Stanships, Inc.*, 485 U.S. 265, 267-68 (1988); *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988);

AAA Venetian Blind Sales, Inc. v. Beaulieu of Am., Inc., 1997 WL 476517, *4 (6th Cir. Aug. 19, 1997); *Reed v. Country Miss, Inc.*, 1995 WL 348041, *2 (6th Cir. June 8, 1995).

In this case, the request for costs is typical and is subject only to very particular objections, most of which are legal in nature. Hence, those matters need little exposition here.

As for the other requests, they require exposition. The sanction request depends on an analysis of Plaintiff and Plaintiff's counsel's litigation conduct, including discovery conduct. The discussed misconduct concerns the concealment and non-disclosure of the complete February 7, 2002 Enterprises Board meeting recordings, in addition to some other taped recordings, and the making of perjurious and deliberately incomplete summary judgment affidavits. The meeting recordings were an absolutely crucial piece of discovery because it showed that Plaintiff had altered the

February 7, 2002 meeting minutes[1] to include matters not discussed in the meeting and to exclude other matters which were discussed in the meeting. This fact doomed her retaliation claim because the alteration of the board minutes was a non-retaliatory reason given for Plaintiff's discharge, and, even if Defendants had decided for retaliatory reasons earlier to discharge her, they had protected her position as part of the investigation process until the alteration of minutes was discovered.

Let us review what has been told this Court about the February 7, 2002 Enterprise Board meeting and tapes, which has changed like the directions of a fickle wind. On February 28, 2005, in connection with Plaintiff's Motion *in Limine*, Mary Scott filed an affidavit asserting that "My draft of the February 7

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[1] Plaintiff's briefing makes much of the fact that she altered the minutes before they could be approved by the Board, which incidentally never occurred because she also "mislaid" the tapes concerning the meeting and contested the minutes drafted by Diane Wiest (the person assigned the job of drafting the minutes by the Board). Even assuming the "draft" minute argument, this does not make Plaintiff's conduct non-criminal. Michigan law prohibits an officer from not only falsely altering minutes, but also falsifying them at all. *See* Mich. Comp. Laws § 450.1932(2). Though when Plaintiff was caught she could no longer succeed in her attempt to falsify the minutes, she was still guilty of attempted falsification, which under Michigan law is likewise punishable as a crime. *See* Mich. Comp. Laws § 750.92. Plaintiff's argument, thus, ignores the purpose of the criminal law which punishes offenders even if they are caught before the crime is consummated. It also ignores that an employer, even apart from the expectations of the criminal law, has a legitimate workplace expectation that such conduct not occur.

Board Minutes correctly reflected and was an accurate rendition of the events which occurred at that meeting . . . and was supported by the tape recorded record of the meeting." (Dkt. No. 381, Ex. E (Scott Aff., Feb. 28, 2005) ¶ 2.) This message was consistent with Plaintiff's counsel's briefings of the time.

On or about February 7, 2005,[2] Defendants filed their first Motion for Partial Summary Judgment regarding Plaintiff's retaliation claim. The supporting Brief included reference to both a partial transcription of the February 7, 2002 Enterprise Board meeting provided to Defendants in discovery and a partial tape regarding the same, which was also previously provided to attorney Jeff Fraser. (*See* Dkt. No. 347, Ex. V & Ex. M (Fraser Aff., Feb. 7, 2005) ¶ 26.) The transcript was prepared by a certified court reporter, Ann L. Herman, based upon a cassette tape. The transcript reflects one audiotape. It was impossible to determine from either the audiotape or the transcript the accuracy of Mary Scott's minutes because neither the tape nor the transcript purported to be a complete record of the February 7, 2002 meeting.

Plaintiff responded in opposition to the Motion. The opposition was supported by Plaintiff Mary Scott's Affidavit, which stated in pertinent part:

> I made the revisions of the minutes from memory of what occurred and asked for the

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[2] The papers were submitted on February 7, 2005, but not formally filed until February 14, 2005, after the Court had approved a motion to exceed the page limitation.

> tapes with the intention of listening to them at a later time . . . . Although I knew the additional information I had included in the minutes was correct, I wanted to make sure that I had not left something out . . . . Soon thereafter, within a week or so, I found one of the tapes, which much to my delight, contained a portion of the minutes at issue. I then issued a supplemental explanation to [attorney] Fraser that was based on the tape.

(Dkt. No. 425, Ex. R-1N (Scott Aff. in Rebuttal of Wiest, Mar. 10, 2005) ¶ 11.) In a separate affidavit filed by Scott concerning attorney Fraser's testimony, she again affirmed that "the revisions I made to the minutes were accurate . . . ." (Dkt. No. 425, Ex. R-1E (Scott. Aff. in Rebuttal of Fraser, Mar. 10, 2005) ¶ 12.)

Plaintiff's Response to the Motion also attached a much lengthier transcript.[3] Plaintiff's transcript was transcribed by Therese M. Headley and noted the use of three micro-cassettes. (*See* Dkt. No. 425, Ex. R-20A at 1; Ex. R-20B at 55 & 64.) The transcript was longer than previous transcripts and appeared to be a transcript of the entire meeting. (*Id.*) Neither the transcript nor the entire recording upon which it was based were previously provided to Defendants in discovery.

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[3] Those documents were first filed on March 14, 2005 as part a motion for leave to exceed the page limitation. After an order entered allowing the excessive pages, the documents were refiled the following day – the ides of March, which was fitting given the circumstances. (*See* Dkt. Nos. 424 & 425.)

Defendants' first Motion for Partial Summary Judgment was denied by Order of May 2, 2005 without prejudice. At the time, the Court was not so concerned about the content of the tape or transcript, but was concerned about Mary Scott's affidavits, which were replete with opinions which were outside her personal knowledge and, therefore, not proper evidence under Rule 56(e). (*See* Dkt. Nos. 497 & 499.) The Court also hoped that the re-filing of the motion would result in a more compact and readable record, though such was a vain hope. In the course of these events, though, Defendants' attorneys discovered the lengthier transcript, which was then significant to the later briefing.

On May 13, 2005, Defendants filed their Renewed Motion for Partial Summary Judgment.[4] (Dkt. Nos. 507 & 508.) Plaintiff's Affidavit in response to said

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[4] Plaintiff suggests in the briefing that the Court's summary judgment ruling was mistaken because (1) she had a duty to "correct" the deficiencies in the minutes and (2) her firing was preordained at the time of Bob Smedes' hiring. Neither conclusion is warranted by the record. Plaintiff's supposed "corrections" related to some other reality than what was said at the meeting. The purpose of the minutes, of course, was to document what was said at the meeting. As for Bob Smedes' hiring, the record shows that no termination was made until after and because of her undisputable misconduct in altering the minutes (at a time when she was being legally protected as part of an independent attorney investigation of her False Claims Act allegations). Plaintiff does make several other characterizations of the Court's prior Opinion which are simply false and a misreading of the Opinion. For example, Plaintiff suggests that the Court believed that "defense affidavits could not be false . . . ." (Dkt. No. 599 at 21-22 n.33.) This is far from the truth and a rather foolish accusation to make against an Article III judge that daily deciphers the standards under Rule 56. In deciphering those standings, the Court gives the non-movant every possible inference; however, when certain facts are not contested or uncontestable, they cannot be ignored under Rule 56. Likewise, references to Plaintiff's expert testimony concerning case studies about "group-think" in corporate organizations was inadmissible expert testimony which did not meet the requirements of Federal Rules of Evidence 702-04, *see Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), and was the kind of testimony that was so general that it would not have assisted the jury in resolving the case. There are many other examples of misstatements in Plaintiff's Response, particularly sections 3A.5 and 6. Suffice it to say, the Court disagrees with those characterizations and relies upon its previous Opinion and the documents supporting it to refute them.

Motion disclosed, when read in the context of complete transcript: (1) that she had originally produced a fragmentary tape of the February 7, 2002 meeting to Jeff Fraser, Dkt. No. 535, Ex. 9 (Mary Scott Aff., May 27, 2005) at 74-75 ¶ 11; (2) that after she produced the fragment she discovered the complete tape recordings of the meeting and "[t]hat the tapes eventually showed up and had not been recycled was sheer luck[,]" *id.* at 75-76 ¶ 12; (3) that she had deleted from the minutes a statement made by Faas concerning attorney review of the physician model because she believed that the statement was historically inaccurate, even though it was actually made by him at the meeting, *id.* at 92-93 ¶ 12.J; (4) that she added to the minutes a statement by her requesting review of the model by counsel, though it had not been made at the meeting, *id.*; and (5) that during the meeting Diane Wiest was assigned the job of taking the minutes, *id.* at 92 ¶ 12.I. The substance of Plaintiff's Affidavit, as well as the other record evidence, when read critically and with some commonsense understanding of litigation practices demonstrate that Plaintiff unlawfully retained the original three recordings (which were Defendants' property) and determined not to disclose them. (*Compare* Dkt. No. 599, Ex. 8A--emails from attorney Lynn Hynds advising Plaintiff not to disclose a tape to

Defendants[5] with Defs.' Ex. 510, L21, Rule 26-07237--Rule 26 disclosure stating that, according to Mary Scott, the non-disclosed 2/7/02 tapes were lost or recycled).

It is apparent from a review of the complete transcript why it was significant to have the complete[6] tape recordings and/or transcript in discovery. Without them, Plaintiff would not have had to confront the unauthorized amendments to the Board Minutes

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[5] The Court does believe that a whistleblower has a qualified privilege to retain certain workplace records to prove fraud under circumstances when the retention of the property constitutes "protected activity" under the statutory authorization to report and investigate wrongdoing. *See* 31 U.S.C. § 3730(h). However, this privilege must be exercised consistent with its limited purpose, the Congressional scheme, and consistent with the rights of the property owner (*i.e.*, by taking steps which both safeguard the property and do not deprive the property owner of all use, such as surrendering the property to an impartial custodian for agreed shared use). Such a limited privilege is not a right to plunder and ambush. Thus, even if counsel were advising Plaintiff not to disclose the 2/7/02 tapes, she had a legal and moral obligation to disclose the tapes (since they were Defendants' property) and, once the suit was filed and Rule 26(a) implicated, she had an obligation to disclose the content of all workplace recordings.

[6] No version of the tapes are 100 percent complete in that there are some breaks and inaudible portions in the recordings. These portions are significant in assessing the use of the tapes for evidentiary purposes, but they are not significant when assessing the tapes for discovery purposes – as to which the tapes were crucial to an understanding of the amendment of the minutes.

which she made without company direction or approval, and which were frankly dishonest.[7]

On May 12, 2005, Defendants filed a Motion *in Limine* regarding Tape Recordings and Transcripts. (*See* Dkt. Nos. 502, 503, 505 & 506.) As part of the Motion *in Limine*, Defendants filed the fragmentary tape of the meeting which was produced for them in discovery. (Dkt. No. 512, Ex. A, marked as MS-Rule 26-00680.) The Court has listened to the tape and confirms Defendants' opinion that it did not contain significant materials contained in the previously filed transcript.[8] (*Compare* Dkt. No. 421, Ex. R-20A and R-20B–transcript.) In particular, the Rule 26(a) tape

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[7] Plaintiff has consistently claimed that she did so to incorporate by reference prior discussions not included in the meeting. While it may have been important for other Board Members to have understood prior meeting dialogue, this could and should have been conveyed by making a record of the prior meetings as opposed to altering the record of the February 7, 2002 meeting to render it inaccurate. This is particularly so since both Scott and the Board had assigned to Wiest the job of making and keeping the minutes. Additionally, the Court notes for the purpose of this record that it frankly disbelieves Plaintiff's account of the prior unrecorded meetings. The timing of these events and Plaintiff's peculiar actions within the context of events, including losing and then finding the tapes, suggest that she was trying to make a false record concerning the matters reported upon for the purpose of buttressing her legal claims.

[8] The Rule 26 disclosure tape supplied to Defendants also differs in significant respects from the recordings filed by Plaintiff's counsel/Plaintiff's expert in connection with Plaintiff's Response to the *in limine* motion concerning the tapes. (*Compare* Dkt. No. 533, Ex. 23C.)

provided in discovery only included the recorded portion of the meeting through page 43 of the transcript, *i.e.*, it ends abruptly in the middle of Faas' statements at the end of page 43 of the transcript and omits the balance of the second tape and the whole of the third tape. The omission of these materials under Rule 26 is highly significant, notwithstanding that the concealment of the tapes, and the piecemeal disclosure of them made the evidence unreliable in some respects. That is, the omission of these disclosures (because they provided the most complete record of the meeting) delayed the eventual admissions by Plaintiff which resulted, inevitably, in her loss of the case.

At this point, the Court must consider Plaintiff's most recent explanations of what occurred in the context of discovery. Plaintiff's counsel says:

> Plaintiff in fact produced copies of all three 2/7/02 taped recordings. Defendants' claim that they only received partial copies of these tapes is incomprehensible and unbelievable, given that the claim flies in the face of all of the evidence relative to this matter, which was previously produced for the Court.

(Resp., Dkt. No. 599 at 8.)

Plaintiff's counsel, in making these statements, refers to the Affidavit of Amy Brown, a paralegal in Plaintiff's firm. Brown says that she received three micro-cassettes from someone in her firm (represented to be three micro-cassettes received from Mary Scott) and then submitted them to John Ware of IKON (a cassette copying company) who then provided two

copies, one of which was provided to Defendants' counsel in July 2004.[9] (Dkt. No. 599, Ex. 4 (Brown Aff.) ¶¶ 2-5.) Interestingly, Brown does not say certain things which one would expect as part of such an affidavit. She does not say that the tapes contained the contents of the full transcript. She does not say that she compared the three micro-cassettes to the copy which was sent to Defendants' counsel to confirm that the total recordings were of the same length. She also does not make any statement as to why the "originals" were not returned, or otherwise shared or held in common, to prevent the kind of partial disclosure which eventually occurred.[10] Finally, she also does not offer any explanation as to why the tape Defendants received is significantly different from the tape recording upon which the lengthy transcript was based.

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[9] The July timing is not explained and the previous Case Management Order had required Rule 26(a) disclosures by April 26, 2004. (Dkt. No. 144, ¶ 3.)

[10] Scott's deposition testimony about the production of the tapes (that she produced either two or three tapes) is likewise less than lucid. (Scott Dep., Dkt. No. 588 at 377.) Given that the tapes were so crucial to the case and given that she had not initially disclosed all of the tapes, her testimony that she could not recall the number of tapes concerning the February 7, 2002 meeting is incredible and, in the Court's judgment, was designed to hide the non-disclosure of the complete recordings. Additionally, the non-disclosure of the "original" version of the tapes was also significant because it prevented a defense expert from studying the tapes to determine whether the tapes which Plaintiff has represented as "originals" were in fact original recordings, as opposed to re-recordings which manipulated the inaudible portions.

What is more interesting than Plaintiff and Plaintiff's counsel's testimonials to their "honest" disclosures is the record of emails concerning the disclosure of all of the tapes in the case. The extent of non-disclosure was always an issue in this case for at least three very significant reasons: first, Defendants needed a complete copy of the February 7, 2002 recording to understand the minutes controversy; second, Defendants long believed that Plaintiff had a box of secret and covertly-made tapes which were not disclosed, because Plaintiff showed Diane Wiest "a baggie full of tapes that [Plaintiff] said she was 'taking to the bank,' . . . ." between April 24, 2002 and May 21, 2002 (Wiest Aff., Feb. 7, 2005, ¶ 16); and third, given the disputed disclosure issues, Defendants needed to study all taped evidence for the purpose of assessing authenticity, accuracy and modifications.

The recent record of email correspondence filed by Plaintiff reveals that Plaintiff and her counsel kept from Defendants other copies of tapes after Defendants had requested the disclosure of all originals and copies. On January 4, 2005, Scott sent an email to Amy Brown stating:

> If I come to your office this week could I look at the audio tapes that I have already turned over to you?
>
> I have a few other tapes but am still looking for one of them and want to see if I already have provided it to you.

> Could I stop in Thur. or Friday (I know that Monica will be in GR)?

(Dkt. No. 599, Ex. 7 at 9.)

On January 31, 2005, Plaintiff sent an email to Plaintiff's counsel, Monica Navarro, which email appears to reference the disclosure problem concerning the February 7, 2002 tapes and transcript:

> I went through the transcript that Amy sent me. If this is her most complete version than I probably need to come to your offices and sit with her so we can listen to the tapes and fill in the blanks and names . . . .

(Dkt. No. 599, Ex. 7 at 11.)

On March 21, 2005, in the midst of the controversy concerning whether Plaintiff had disclosed all of the tape recordings, Monica Navarro sent the following email to Mary Scott:

> First, on the tapes, you were extensively deposed on whether there were other tapes and you said there were not. So we need to deal with this issue one final time and never revisit it again because I don't want you to be accused of concealing evidence. Here is what you need to do. Give me a narrative of what you found since your deposition that is not addressed in our reply brief by date of recording and a statement as to why you did not find it before, and all the "original" tapes (we can have them copied) . . . we have to make a supplemental document production. I am not going to modify the

> reply brief because it will significantly weaken our position to state there are other tapes which we have not produced (even if we claim they are irrelevant). My preference would be to deal with this after the Court rules, but we may not have that luxury . . . .

(Dkt. No. 599, Ex. 7 at 17.)

Plaintiff's Response alludes to the March 21, 2005 email and attempts to explain the matter as follows:

> On the morning of 3/21/05, as counsel was in the process of filing Plaintiff's Reply . . ., Plaintiff's counsel was advised by Mary Scott that she had just found a box with additional unclear or unmarked tapes in connection with moving her residence out of Grand Rapids, that she had not listened to the tapes to determine exactly what they were, and that some looked like they could be *originals* (as opposed to copies) . . . . Having [previously] exhaustively reviewed with Plaintiff and other available sources the existence, availability, and status of all tapes . . ., Plaintiff's counsel concluded that these so-called *additional* tapes had to be nothing more than copies (or hopefully originals) of that which had already been produced . . . . Accordingly, Plaintiff's counsel advised Plaintiff that it would not address the newly found tapes . . . in the . . . Reply, which had already been drafted . . . .

(Dkt. No. 599, at 12 n.19.) The explanation then concludes by noting a May 13, 2005 email which documents that Plaintiff's counsel only found one

additional tape to disclose, which was disclosed on May 13, 2005. (*Id.*)

If the present case were a standard case about uncontested recordings made by an impartial recorder, then the attention to the various versions of tapes would seem overblown. It is not, though. The present case is about secret and covert recordings made by an interested party, and involves a history of mishandling the evidence so as to make its authenticity and accuracy suspect. Within this context, Defendants were entitled to examine every tape (even if they were mere copies, but especially if they were originals). This is because a copy, by a slight variation in the recording, might show forensically how a copied tape had been modified, especially if there was a history of two or more re-recordings of the same tape. Also, the sheer number of multiple recordings would be relevant to the issue of whether some suspect activity was afoot regarding the recordings. If the tapes were original, then they would be even more crucial to an understanding of the authenticity and admissibility of both the originals and other copies. Plaintiff's counsel should have been keen to these possibilities since they employed a sound expert in the case for the purpose of defending the authenticity of certain recordings and since they anticipated the filing of a motion *in limine* concerning the recordings even before such was filed.[11]

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[11] Unlike the February 7, 2002 recordings, one cannot say that the non-disclosure of the additional tapes caused prejudice because their content is unknown. However, it certainly provides some context for other non-disclosures made in the suit.

What is indubitable here is that it was incumbent upon Plaintiff and her counsel under Rule 26 to disclose complete copies of the three February 7, 2002 recordings and this was not done. Why was it not timely done? Amy Brown's Affidavit suggests that an attempt was made to disclose the complete recordings. Was the entire recording not produced because of innocent copying error? This is unlikely for several reasons. This was the one piece of evidence in this case which was too important to disclose without double and triple checking the accuracy of the disclosure. Furthermore, the Court believes that it is standard practice for a credible tape copying company to compare the length of the "original" recordings to the copies to confirm that the recordings were the same length in minutes, *i.e.*, a significant difference in tape length would have been noticed. Given the remote likelihood that the non-disclosure was not due to a simple copying error, and given the email correspondence which reveals that Plaintiff was involved in deliberate non-disclosure of additional tape recordings, the Court concludes that Plaintiff's non-disclosure of both the complete 2/7/02 recordings and the additional recordings was intentional, was motivated by a bad faith desire to conceal discovery materials, and had the effect of both delaying the resolution of the suit and forcing Defendants to pay avoidable legal expenses.

Additionally, the Court also concludes that the early summary judgment affidavits filed by Mary Scott were intentionally false, omitted significant information known to her (*i.e.*, that she had made revisions to the minutes not based upon what was said

at the meeting), and were filed in bad faith to the prejudice of Defendants.

LEGAL STANDARDS

Costs are governed by 28 U.S.C. § 1920, which provides:

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

28 U.S.C. § 1920.

Regarding sanctions, there are not one, but several, standards pertinent to discovery disclosure and litigation conduct. First there are the discovery requirements of Rule 26. Rule 26 is about disclosure and, since the 1993 amendments, mandates disclosure, without a request, within 14 days after the Rule 16(f) conference or such other time as the court may order. Rule 26(a) provides in pertinent part:

> **(a) Required Disclosures; Methods to Discover Additional Matter.**
>
> **(1) Initial Disclosures.** Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:
>
> . . . .
>
> **(B)** a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;. . .
>
> These disclosures must be made at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order. . . .

Fed. R. Civ. P. 26(a).

Once discovery is disclosed, Rule 26(e) requires that it be properly supplemented:

> **(e) Supplementation of Disclosures and responses.** A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:
>
> **(1)** A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. . . . .
>
> **(2)** A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

Fed. R. Civ. P. 26(e). Rule 26(e) is policed by Rule 37(c)(1), which authorizes sanctions for failure to supplement discovery disclosures as well as other Rule 26(a) violations.

When discovery is not made in compliance with Rule 26, Rule 26(g)(3) authorizes sanctions under certain conditions:

> **(g) Signing of Disclosures, Discovery Requests, Responses, and Objections**
>
> (1) Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.
>
> (2) Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. . . . The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:
>
> (A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

> **(B)** not interposed *for any improper purpose*, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and
>
> **(C)** not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. . . .
>
> **(3)** If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

Fed. R. Civ. P. 26(g).

Rule 56(g) authorizes sanctions for a separate problem – an intentionally false or misleading affidavit which was filed in bad faith or for delay in the context of summary judgment filings. The Rule provides:

> **(g) Affidavits Made in Bad Faith.**
>
> Should it appear to the satisfaction of the court at anytime that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to

> the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Fed. R. Civ. P. 56(g).

LEGAL ANALYSIS

1. Costs

Costs are sought by Defendants, initially, in the amount of $25,425.54. This is itemized as $12,569.03 for transcript fees (28 U.S.C. § 1920(2)); $1,265.71 for witness attendance, mileage and like fees (28 U.S.C. §§ 1920(3) & 1821); $5,030.60 for copying fees (28 U.S.C. § 1920(4)); $145.00 for docket fees (28 U.S.C. §§ 1920(5) & 1923); and $6,415.20 for other expenses. These items are supported by a proper declaration, under 28 U.S.C.§ 1924, that the costs were actually and necessarily incurred in the action. In later briefing, though, Defendants concede that one post-judgment invoice of Patricia Igor (for $275) should not be paid, making the total for other costs $6,140.20, and all costs sought $25,150.54.

As to the assessing of costs, the Sixth Circuit Court of Appeals has said:

> The types of costs that may be assessed against the losing party are enumerated in 28 U.S.C. § 1920, and include fees for court reporters, witnesses, and photocopying. This Court has held that the language of Rule 54(d) "creates a presumption in

favor of awarding costs, but allows denial of costs at the discretion of the trial court." *White & White, Inc. v. American Hosp. Supply Corp.*, 786 F.2d 728, 730 (6th Cir. 1986). Because Rule 54(d) establishes a norm of action entitling the prevailing party to its costs as of course, a district court's discretion to depart from the rule and deny costs is more limited than it would be if the rule were "nondirective." *Id.* at 731-32.

Among the factors the district court may properly consider in denying costs to a prevailing party are whether the prevailing parties taxable expenditures are unnecessary or unreasonably large, *Goostree v. State of Tennessee*,796 F.2d 854, 864 (6th Cir. 1986), *cert. denied*, 480 U.S. 918 (1987); and the losing party's inability to pay, *Congregation of the Passion v. Touche Ross & Co.*, 854 F.2d 219, 222 (7th Cir. 1988).

Texler v. County of Summit Bd. of Mental Retardation & Developmental Disabilities, 1994 WL 252938, **9 (6th Cir. June 8, 1994).

Plaintiff has made particular objections. First, she objects that the deposition and transcript fees were insufficiently documented. The Court has reviewed the Appendix to the Bill of Costs, which set forth the date, deponent and charge of each of the depositions billed. The Court can discern from its prior review of the record that the deposition transcripts at issue were necessary to the case. The charges listed appear consistent with the standard rates and practices for court reporters in the Western District of Michigan

and are otherwise reasonable charges which should be reimbursed. Thus, there is no basis for the objection.

Plaintiff's second objection is to providing reimbursement for witness fees, mileage and lodging expenses, which Plaintiff believes either were not paid or were not sufficiently documented. However, it is reasonably clear from the documentation provided, which lists the witnesses' addresses, the appearance fees (for record deposition testimony), the mileage and related charges billed under 28 U.S.C. § 1821, that those charges are consistent with the statutory limitations and were sufficiently documented with one exception.

The following quotation explains the pertinent law:

> In interpreting Section 1821, courts consistently have held that parties are not entitled to witness fees for their own appearances in court. *See, e.g., Green Const. Co. v. Kansas Power & Light Co.*, 153 F.R.D. 670, 678-79 (D. Kan. 1994); *Ingersoll Milling Machine Co. v. Otis Elevator Co.*, 89 F.R.D. 433, 435 (N.D. Ill. 1981). Equally consistently, however, courts have held that costs may be assessed for corporate officers and directors not personally involved in the litigation who testify on behalf of the corporation. *See Green Const. Co.*, 1994 WL 76612 at *6 . . . . ; *Ingersoll*, 89 F.R.D. at 435; *see also* 10 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2678, at 376.

WH Smith Hotel Servs., Inc. v. Wendy's Intern., Inc., 25 F.3d 422, 429-30 (7th Cir. 1994); *see also Kemart Corp. v. Printing Arts Research Labs., Inc.*, 232 F.2d 897,

901-02 (9th Cir. 1956) (stating same rule and citing cases); *Hill v. Gonzalez*, 53 F.R.D. 1, 3 (D. Minn. 1971) (stating that a prevailing party may tax an expert witness fee to the extent of the section 1821 allowance).

In the present case, all of the witness fees under 28 U.S.C. § 1821 related to corporate employees, corporate officers, or persons who were under service contracts with Defendants (*i.e.*, attorneys, contractors and expert witnesses). Each of those persons were doubtlessly compensated at rates exceeding $40 per day for the time spent (and the other calculations of mileage, travel and lodging appear otherwise accurate). The one exception is Michael Faas who, because he was a party, does not fall within the rule of section 1821 for witness reimbursement. As such, the objection is granted to the limited extent that the Court will reduce the amount billed by $43.94 to eliminate compensation for Faas.

Plaintiff's third objection asks for something patently unreasonable. Plaintiff asks that Defendants' copying expenses be disallowed for not documenting the purpose and number of the multiples copies referenced, *i.e.*, the bill lists the items copied and the total pages, but not the total numbers of copies (which could be determined by comparing the original to the number of copies, assuming no wasted copies). This request is unreasonable to the extent that it asks for a more detailed documentation since the bill and appendix are specific enough to document the expenses. The copying at issue has been done in a document intensive case in which the Court and the Clerk's office is literally filled with the many boxes of

copies filed, including many sealed copies (which are not filed *via* the ECF system). These documents were not merely convenient, they were a necessity to any proper adjudication of this case, particularly since the contentiousness of this litigation turned every paper filed into a contest of blows and particularly since the Court has limited resources. Moreover, to require more specific justification of multiple copies in a case in which thousands of such copies were necessary would thwart Congress' intended award of such copying fees. The objection is denied.

Plaintiff's fourth objection concerns the allowance of computer aided research fees, *i.e.*, Westlaw service charges. Plaintiff has a point to the objection because even those decisions which permit electronic research charges do so as an element of "attorney fees" as opposed to an element of "costs." *See, e.g., Leftwich v. Harris-Stowe State College*, 762 F.2d 686, 695 (8th Cir. 1983); *Cont'l Ill. Sec. Litig. v. Cont'l Ill. Corp.*, 962 F.2d 566, 570 (7th Cir. 1992); *Case v. Johnson County, Kan.*, 157 F.3d 1243, 1258 (10th Cir. 1998). Therefore, the objection will be granted as to "costs." However, this denial is "without prejudice" and Defendants may renew the requests in the context of future briefing as to the amount of reasonably and necessarily incurred attorney fees. The same holding applies to Defendants' electronic exhibit expenses, which was reasonably and necessarily incurred and in the character of a reasonable attorney expense, but is not a statutorily authorized cost.

Therefore, costs are allowed in the total amount of $18,966.40.

2. Sanctions

Sanctions are not a pleasing subject to either parties, attorneys or the courts which must enforce them. This Court is always reluctant to impose sanctions, both against parties, who are typically inexperienced and without legal expertise, and against attorneys, who generally speaking are trying to earn a living in the difficult win or loss arena of federal litigation.

Notwithstanding this Court's reluctance, Rules 26(g) and 56(g) now mandate sanctions for bad faith violations of the Rules. "Sanctions under Rule 26(g)(3) are not discretionary if the district court finds that a discovery filing was signed in violation of the rule." *McHugh v. Olympia Entm't, Inc.*, 37 Fed. Appx. 730, 741 (6th Cir. May 28, 2002). Rule 26(1) imposes a duty of reasonable inquiry as to the completeness of a discovery disclosure.

In this case, disclosure duty related to the recordings of the February 7, 2002 meeting, which was the most important piece of evidence in this case. The disclosure was not complete and there was no substantial justification for its incompleteness. Indeed, it appears that the non-disclosure was either intentional or, at the least, the product of a complete failure to make any "reasonable inquiry" into the completeness of the disclosure. As stated above, the Court concludes that the non-disclosure was done intentionally and in bad faith. The Court also concludes that it was due primarily to Plaintiff (who initially secreted the tapes and then retained them until later disclosed). Given the bad faith nature of the

delayed disclosure and the prejudice cased by it, a significant financial sanction is justified. Plaintiff will be required to pay the costs incurred because of the violation, including a reasonable attorney fee caused by the non-disclosure.[12] *See also Dugan v. Smerwick Sewerage Co.*, 142 F.3d 398, 407-08 (7th Cir. 1998); *Salgado by Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 739-40 (7th Cir. 1998).

This result, which is dictated by the terms of Rule 26(g), is also consistent with case law. Another similar case is *Deese v. Springfield Thoracic & Cardiovascular Surgeons*, 183 F.R.D. 534, 536-37 (C.D. Ill. 1998), which imposed Rule 26(g) sanctions for the failure to disclose an audio tape and transcript of the tape. The non-disclosure in *Deere*, as in this case, was a matter the offending party had planned for the purpose of surprise. In this case, the matter not disclosed was far more important to the case. Also, the consequences of non-disclosure were far graver than in *Deere* and much more than the $1,000 sanction imposed in *Deere* is warranted in the present case.

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[12] Rule 26(g)(3) authorizes the sanction to be imposed against either or both the offending attorney or party. The Court will leave for later briefing the amount of such sanction. The Court will impose this liability only upon Plaintiff, and not against Plaintiff's counsel, because the history of this suit and the many exhibits show rather clearly that Plaintiff, much more so than her lawyers, was the driving force behind the various disclosure problems. The Rule 26(g)(3) liability will begin as of the date of the Order denying Defendants' first summary judgment motion (May 2, 2005), on the theory that complete disclosure would have avoided the remainder of the suit since summary judgment would have been granted earlier.

Rule 56(g) provides a mechanism for the imposition of sanctions for "bad faith" affidavits filed as part of the summary judgment practice of the federal courts. "Bad faith" under the Rule includes the making of affidavits containing perjures or blatantly false allegations or omitted facts concerning issues central to the resolution of the case. *Gaston, Inc. v. Sullivan*, 178 F.R.D. 412, 415 -16 (S.D.N.Y. 1998); *see also Sutton v. U.S. Small Bus. Admin.*, 92 Fed. Appx. 112, 118 (6th Cir. Dec. 4, 2003) (citing *Gaston* with approval); *SMS Assocs. v. Clay*, 868 F. Supp. 337 (D. D.C. 1994) (affirming sanction).

Although it is a rare case which qualifies for a sanction under Rule 56(g), the present one qualifies. Plaintiff made intentionally false and misleading statements in her affidavits filed in connection with Defendants' first summary judgment motion, which had the effect of delaying the grant of summary judgment for several months. As such, Plaintiff Mary Scott (the party employing the bad faith affidavits) shall be required to pay the costs incurred by Defendants, including attorney fees, from time of the denial of the first summary judgment motion (May 2, 2005) until the entry of judgment (June 23, 2005).

Additionally, as noted in the briefing, the federal courts have inherent authority to impose sanctions on a party and attorney for bad faith conduct during the course of litigation. *See Chambers*, 501 U.S. at 43-50; *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765-66 (1980); *Ray A. Scharer & Co. v. Plabell Rubber Prods., Inc.*, 858 F.2d 317, 320-21 (6th Cir. 1988); *Shimman v. Int'l Union of Operating Eng'rs, Local 18*, 744 F.2d 1226, 1230 (6th Cir. 1984) (en banc). The "bad faith"

conduct described on this record justifies not only an award of the sanctions described above, but an award for their attorney fees and costs incurred by Defendants in this litigation.[13]

Plaintiff's conduct in the filing of the suit, when she knew that she had without authority modified the Board minutes to make them inaccurate by including statements not made at the meeting and deleting statements made at the meeting, means that the filing of the suit was not objectively reasonable and was done in bad faith. This is particularly so because the bad faith conduct caused Defendants prejudice and necessitated Defendants' defense of a massive and costly but legally baseless suit. This finding thus justifies the liability imposed above and additionally costs and attorney fees incurred by Defendants from the time of the filing of the suit until the entry of judgment as specified above. The amount of those costs and attorney fees will be determined as a result of

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[13] Since it has not been shown that the original *qui tam* allegations (which were dismissed voluntarily) were frivolous, the Court will not require Plaintiff to pay for the defense of those allegations. Therefore, for the period of July 2, 2002 through January 30, 2004 (dismissal of *qui tam* allegations), Plaintiff's liability is limited to the services expended in defending the employment claims only. After January 30, 2004, Plaintiff shall have full liability for Defendants' fees and expenses until dismissal of the action because the action at that time related solely to Plaintiff's employment/retaliation claims.

additional briefing.[14] *See also Kinnear-Weed Corp. v. Humble Oil & Ref. Co.*, 441 F.2d 631, 636-37 (5th Cir. 1971).

While saying so, the Court acknowledges that this ruling works contrary to the American rule that parties pay their own attorney fees and expenses. In making the ruling, the Court has duly considered the complexity of the case, the public's interests in reporting false claims against the Government, and that the fees will be paid by an affluent, but unemployed, ex-executive. Notwithstanding such concerns, this record demands the sanctions. This record shows why large but frivolous cases impose enormous costs, both on society and the courts. Unless those responsible are held to account, their folly will be repeated and we will all be the poorer.

CONCLUSION

For the reasons given, an Order shall enter approving costs in the amount of $18,966.40, approving liability as to Defendants' attorneys fees and expenses, and requiring further briefing as to the amount of those fees and expenses.

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[14] It is obvious that the sanction awards overlap. The Court does not intend to reimburse the same expenses multiple times, but does intend to provide multiple rationales for the award of the expenses incurred in this suit.

/s/ Richard Alan Enslen
RICHARD ALAN ENSLEN
SENIOR UNITED STATES DISTRICT JUDGE

DATED in Kalamazoo, MI:
September 29, 2005

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:02-CV-485

[Filed September 29, 2005]

UNITED STATES OF AMERICA, *ex rel.* MARY SCOTT, Plaintiff,	)
v.	)
METROPOLITAN HEALTH CORPORATION d/b/a METROPOLITAN HOSPITAL, a Michigan corporation,	)
and	)
MICHAEL FAAS, an individual, jointly and severally, Defendants.	)

ORDER

In accordance with the Opinion of this date;

IT IS HEREBY ORDERED that Defendants Metropolitan Health Corporation and Michael Faas' Bill of Costs and Motion for Attorneys' Fees, Expenses and Non-Taxed Costs as Sanction (Dkt. No. 577) is **GRANTED IN PART AND DENIED IN PART**.

IT IS FURTHER ORDERED that costs are awarded in favor of Defendants and against Plaintiff Mary Scott in the amount of $18,966.40.

IT IS FURTHER ORDERED that liability is assessed against Plaintiff and in favor of Defendants as to the specified attorney fees, costs and reasonable expenses incurred in this suit.

IT IS FURTHER ORDERED that Defendants shall, within 14 days, provide a legal memorandum and supporting materials establishing the amount of the fees, costs and expenses sought.

IT IS FURTHER ORDERED that Plaintiff may respond within 14 days, and Defendants may reply to the response within 14 days thereafter.

IT IS FURTHER ORDERED that Defendants' initial memorandum and Plaintiff's response may each exceed twenty pages, but not twenty-five pages, excluding attachments. Defendants' reply may exceed ten pages, but may not exceed fifteen pages, excluding attachments. Requests for modification of this briefing schedule and briefing limits are discouraged.

/s/ Richard Alan Enslen
RICHARD ALAN ENSLEN
SENIOR UNITED STATES DISTRICT JUDGE

DATED in Kalamazoo, MI:
September 29, 2005

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:02-CV-485

[Filed September 23, 2005]

UNITED STATES OF AMERICA, *ex rel.* MARY SCOTT,
Plaintiff,

v.

METROPOLITAN HEALTH CORPORATION, d/b/a METROPOLITAN HOSPITAL, a Michigan corporation,

and

MICHAEL FAAS, an individual, jointly and severally,
Defendants.

OPINION

The Law is but a Looking Glass;
Not all like the reflections cast.

A. BACKGROUND

Defendants Metropolitan Health Corporation, d/b/a Metropolitan Hospital ("Metropolitan") and Michael Faas (collectively, Defendants) have moved for summary judgment as to all counts of Plaintiff Mary Scott's Revised Second Amended Complaint except her Count II claim that they breached her employment contract by failing to fund a matching contribution to her 403(b) Retirement Supplement Plan. The Motion has been fully briefed and oral argument is unnecessary since the parties have been fully heard through their briefing.

1. General History

Plaintiff Mary Scott, through counsel, filed the instant suit on July 2, 2002, as a *qui tam* action under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729 *et seq.*, for the purpose of suing on behalf of the United States of America concerning false Medicare claims and other related conduct. Upon notice, the United States of America determined to intervene in part and declined to intervene in part. (*See* Dkt. No. 25.) After the intervention, the United States of America, Metropolitan and others voluntarily settled the *qui tam* claims. What remained in this suit are the allegations set forth in Plaintiff's Revised Second Amended Complaint. Plaintiff has alleged in Count I that Defendants violated the anti-retaliation provision of the False Claims Act, § 3730(h), by discharging her and otherwise taking adverse action against her due to legal compliance complaints to corporate officers and

attorneys. Plaintiff has also alleged in Count II that Defendants breached her contract of employment by withholding benefits due her under Metropolitan's Senior Executive Retirement Plan ("SERP") and by failing to pay her a bonus for 2002.[1] Count III alleges that Defendants defamed Plaintiff by making intentionally false statements which harmed her reputation and caused her other financial and personal injuries.

2. Plaintiff's Background

Plaintiff's academic and work background are set forth in her resume. (Ex. 1 at 1-3.) She holds a bachelor of arts degree in economics and political science from the University of Michigan in 1986 and a masters of arts degree in business administration from the University of Chicago in 1988. She worked as a department financial administrator for the University of Chicago Hospitals from 1989-1992. From 1992 to 1993, she worked as a financial consultant for a hospital consulting group (Executive Consulting Group of Boston, Mass.). From 1993 to 1996, she worked as a department financial director for the University of Michigan Hospitals in Ann Arbor, Michigan. This position overlapped with financial consulting she did

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[1] Plaintiff's Response indicates that she has withdrawn her claims for breach of contract relating to the Option It Program. (Pl.'s Resp. at 105 n.69.) Also, as noted above, a failure to make a 403(b) plan matching contribution is also alleged as part of the Complaint, though Defendants have not sought summary judgment on that issue.

for Healthcare Financial & Operational Consulting (1995-1997), which group had contact with Metropolitan and its related entities. As a result of the consulting work, Michael Faas (Metropolitan's President and CEO) and its Board, in 1997, appointed her as the Senior Vice President for Network Operations; as such, she assumed the task of insuring the profitability of for-profit businesses (physician groups and other entities) associated with Metropolitan (which itself is a non-profit corporation). (Ex. 4 & 6.) This financial responsibility included responsibility for revenue improvement in connection with physician services billing. According to Plaintiff's time line, she acquired added responsibility throughout her employment until her termination. (Ex. 6.) Her Vice Presidential duties lasted until she was formally terminated in January 2003, though she was placed on paid administrative leave from Metropolitan much earlier (June 2002) due to allegations of misconduct. (Rev. Sec. Amend. Compl., ¶¶ 46, 56.)

In connection with this briefing, the Court has received hundreds of pages of argument and thousands of pages of exhibits telling the saga of Scott's employment with Metropolitan and the reasons for her

termination.[2] Plaintiff's employment experience is described in her deposition testimony as well as her lengthy Affidavit (Ex. 9), which was drafted to contradict statements of employees and officers of Metropolitan. Given the prolixity of the filings, any synopsis necessarily avoids many of the details explained at length in the briefing. Despite the shortcomings of such a synopsis, the Court believes that its summary adequately captures the essence of this dispute.

3. Plaintiff's Hiring

Plaintiff's work with Metropolitan began in June 1996 as an outside consultant. (Scott Dep. at 35.) In April 1997, she accepted employment with Butterworth Hospital in Grand Rapids, but continued some consulting with Metropolitan. (*Id.* at 39.) During her consulting, she expressed legal compliance (tax and Medicare) concerns relating to Metropolitan's purchase of physician practices. (Ex. B-1; Faas Aff. (Ex. B), ¶ 3.) Despite the expression of such concerns,

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[2] Plaintiff has filed "character affidavits" by physicians, administrators and personal acquaintances, which attest that they witnessed acts of good character and that Plaintiff had a reputation for good character both prior to her employment with Metropolitan and afterwards. (Exs. 3A to 3J.) The Court assumes the truth of those affidavits and that Plaintiff generally has had a reputation for good character. This character evidence is admissible and pertinent to the defamation count, but not as to the other counts given the dictates of Federal Rule of Evidence 404.

she was hired by Metropolitan with a starting date of December 29, 1997 as Vice President of Network Development. (Faas Letter of Dec. 23, 1997 (Ex. B-3).) Faas' letter hiring her is the only written document discussing the essential terms of employment since she was not the subject of a formal employment contract. (*See* Pl.'s Aff. in Rebuttal to Faas (Ex. 9), ¶ 2.)

4. Duties

Plaintiff's own explanation of her initial job responsibilities are given in Plaintiff's Exhibits 4-6. Plaintiff's explanation, which is similar to that given by legal compliance officer Christine Lawrence, describes Plaintiff's role as a leading manager for Metropolitan's for-profit sister entities. These entities are collectively referred to as "Metropolitan Enterprises." These entities function to provide billings services for Metropolitan's associated physicians, manage the "Metro Health Plaza" offices, manage the third-party payer relationships for the Hospital and physicians, and perform other tasks generally related to the Hospital's mission. (Lawrence Aff. (Ex. C), ¶ 5.) As part of this assignment, Plaintiff was one member of Metropolitan's Compliance Committee, though according to both Plaintiff and Lawrence she rarely attended meetings until February or March 2002. (*Id.* at ¶ 6.) Plaintiff admits the membership, but characterizes it as unimportant since Lawrence, not Plaintiff, was responsible for the Committee agenda. (Pl.'s Aff. in Rebuttal of Lawrence (Ex. 9) at 67, ¶ 3.) Plaintiff also indicates that she did not recognize her attendance as low until Lawrence began to circulate an

attendance log in February 2002, and then she attended more meetings. (*Id.*)

Whatever one may think of that assignment and attendance record, Scott, by her own admission, was also assigned to Metropolitan's Billing and Coding Task Force and regarded this as the "most important" legal compliance committee assignment because of its role in private and governmental billings. (Ex. 7 at 31.) The reason Scott's assessment is correct is that such billing and coding determinations, when they are done incorrectly for the purpose of falsely billing the government, will expose the corporate entity, officers and employees to potential criminal and civil liability. According to Plaintiff, she was the only senior level management person who regularly attended these meetings. (*Id.*)

5. Problems Arise

Despite Plaintiff's important role, Metropolitan CEO Michael Faas soon had reservations about Plaintiff's interactions with co-workers and subordinates, including the Metropolitan Enterprises' physicians. (Faas Dep. (Ex. D)at 124-25.) To alleviate these conflicts, Faas appointed Dr. Frank Belsito to assume the role of Enterprise physician management with Belsito reporting to Dr. William Cunningham, Metropolitan's Chief Medical Officer. (*Id.*) Plaintiff had "issues" with these physicians, as well as six to eight other high-level management leaders at Metropolitan, whom she asked Faas to fire. (*Id.* at 125-26; Defs.' Ex. B-12.) Plaintiff traces these early disputes with the

physicians and Lawrence to a physician v. employee lawsuit on which, she believes, Lawrence took the wrong tact (Lawrence refused to settle). (Pl.'s Aff. in Rebuttal to Lawrence, ¶ 1.) She believes that Lawrence was motivated by undeserved loyalty to Dr. Cunningham (the brother of the physician involved in the suit). (*Id.*) In any event, the record is murky as to whether, when Scott was assigned the additional responsibility of managing Metropolitan's White and White subsidiary[3] in January 2000, this was because of technical excellence (Plaintiff's view), because she was "kicked upstairs"[4] to avoid an area of incompetence–*i.e.*, interpersonal relations (Defendants' view), or for both reasons.

Regardless, Plaintiff continued to have conflicts with other corporate managers, although she has blamed those conflicts on the other managers. Another source of conflict at Metropolitan was Tim Crowley, Metropolitan's Chief Operations Officer. According to Faas, in Spring 2001, he attempted to avoid further conflict between Crowley and Scott by assigning Scott (after the completion of the spinoff of White and White) the job of improving Metropolitan's revenue cycle (*i.e.*, the not-for-profit hospital itself). (Faas Aff. (Ex. B) at 18-19.) Scott characterizes this as a promotion of sorts.

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[3] White and White was Metropolitan's medical supply subsidiary which Plaintiff managed until it was sold off in 2001 to third parties. (Faas Aff. (Defs.' Ex. B), ¶ 18.)

[4] The reference, by the Court, is to Lawrence J. Peter & Raymond Hull, *The Peter Principle* at 27 n. & 36-39 (William Morrow 1969).

(Pl.'s Aff. in Rebuttal of Faas (Ex. 9) at 7-8, ¶ 11.) It is not disputed, though, that Faas withheld a bonus from Scott in 2001. (Faas Aff. (Ex. B), ¶ 17.)

Plaintiff does, however, dispute Faas' rationale for withholding the bonus–arguing that it was explained to her in a meeting with Faas that the "in fighting" issue was not confined to her and Crowley, but was an issue for all Board members. (Pl.'s Aff. in Rebuttal of Faas (Ex. 9) at 8, ¶ 12.) Plaintiff also made a secret recording of portions of her meeting with Faas, which portions purport to support the above claim. (*Id.*) At that time, and beforehand, Plaintiff was in the habit of making secret tape recordings of conversations she had with management and Metropolitan's legal counsel, Jeff Fraser, according to her former assistant, Diane Wiest. (Wiest Aff. (Ex. H), ¶ 17.) The circumstances of the recording of those tapes by Plaintiff-- including that the recordings are selective and possibly incomplete, and that portions of the tapes are inaudible--when combined with the furtive and suspicious nature of the taping, and the "accidental" loss of some documented tape recordings, makes those recordings suspect evidence indeed. Nevertheless, the

Court will consider such evidence in the context of the present summary judgment motion.[5]

What is clear from Plaintiff's admissions though, as well as the fact that she felt a need to make secret and selective tape recordings of others, is that she was unhappy with her employment situation with Metropolitan in the fall of 2001. She says that "the Fall of 2001 . . . was an extremely difficult period for me [because] . . . without a single discussion with me, Faas seemingly stripped me of my areas of oversight through the dissemination of a public document which announced that [Robert/Bob] Smedes would not only have the CFO function, but would take over all external concerns of the Hospital . . . . (Pl.'s Aff. in Rebuttal of Faas (Ex. 9) at 9, ¶ 15.) This was no accident. Faas had instituted this change because of Smedes' unique qualifications and as part of Faas' long-term goal to assign Scott work on the Borgess relationship (a dead-end position). (Faas Aff. (Ex. B at 29.) Smedes is a certified public accountant with a successful work history and resume boasting past positions as Director of Michigan's Medicaid program

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[5] Though the Court has elected to review such evidence, the parties should be advised that the Court is of the view that Defendants' Motion *in Limine* Regarding Tape Recordings and Transcripts is well received and would justify the preclusion of the tapes and transcripts were this matter tried given the provisions of Federal Rules of Evidence 403, 1002, 1003, and 1004 and case law pertaining to the common law doctrine of spoliation (*see Welsh v. United States*, 433 F.2d 1239, 1246-48 (6th Cir. 1988)).

and President and CEO of Blue Care Network.[6] (Ex. B-7.) On February 7, 2002, Faas informed Scott's subordinates of the reassignment of all financial duties to Smedes. (Faas Aff. (Ex. B), ¶ 29.) Prior to that, Plaintiff knew that something was afoot because she had sent communications in January 2002 to Faas inquiring about her role *vis-a-vis* Smedes, which inquiries went unanswered pending later meetings. (Pl.'s Aff. in Rebuttal of Faas (Ex. 9) at 12-13, ¶ 16.)

6. Bob Smedes and the OCI

The emergence of Bob Smedes as the new CFO coincided with another important management initiative. At the time, Sandy Sefton, the Chief People Officer at Metropolitan, had sold Faas on the idea of using an outside company, Right Management, to conduct a cultural management assessment known as the Organization Cultural Inventory ("OCI"). Faas agreed to the OCI in August 2001; it was announced in October 2001; and it was completed in January 2002. (Sefton Aff. (Ex. E), ¶¶ 6, 10, 13.) The assessments were based in part on questionnaires completed by a manager's subordinates. When Scott's subordinates found out about the questionnaire, at least three of them approached Sefton to request assurances that negative action would not come to them due to their assessments of Scott. (*Id.*, ¶ 13 & E-8.)

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[6] As his resume suggestions, Smedes was politically well-connected, which was also part of the hiring decision.

Rita Amell of Right Management released the results of the OCI to Scott on February 6, 2002. (*Id.*, ¶ 14.) The evening of the February 6, 2002, Scott called one of her subordinates, Kimberly Speese, at her home (after two previous conversations about the OCI at work); Scott told Speese that she, Scott, was very upset about the OCI and wanted to call a meeting the following day to instruct staff to write Rita Amell to demand a revised assessment. (Speese Aff. (Ex. G), ¶ 7 & G-2.) Plaintiff does not dispute that she was upset by the OCI and disclosed this to Speese. (Pl.'s Aff. in Rebuttal of Speese (Ex. 9) at 58, ¶ 5.) However, she characterizes the OCI results as not reflective of her, particularly since, in her view, Faas was somehow trying to "game" the OCI process to reflect negatively upon her.[7] (*Id.*)

On the following day, Scott had a conversation with Sefton about her displeasure over the OCI results, which was consistent with Scott's remarks to Speese. (Sefton Aff.(Ex. E), ¶ 15.) Scott then took Sefton to a conference room, where her unit had been gathered; Scott told the group that they had not evaluated their division correctly and then abruptly left the group to Sefton. (*Id.* & Ex. E-10.) Sefton then attempted to explain to them that there were no right or wrong

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[7] How this could be so is not explained by Scott and is not a logical conclusion from the record given that the OCI was used as to all senior management and was both designed and implemented by an independent company (Right Management) based on standard techniques. This is not to say, though, that the OCI process was perfect, a thing certainly recognized by Plaintiff's experts.

answers to the OCI surveys. (*Id.*) She attempted to discuss these matters later in the day with Scott, but Scott was not available for discussion. (*Id.*) The same day, Scott sent Faas and Sefton an email describing how she was "perplexed" by the OCI results and describing the team meeting in the conference room as reaching a consensus that the OCI reflected the corporate culture generally and not the interactions of her team members. (Ex. B-18.) Scott also restated her contention that the scoring should be redone because "[e]veryone tells me they love our area and don't want to change anything." (*Id.*)[8]

On February 9 and 10, 2002, Scott, Faas, other officers of Metropolitan (Crowley, Cunningham and Smedes), and selective members of Metropolitan's Board of Directors traveled to Florida for a management conference. While Scott was away, two of her subordinates – Cheryl DeVries and Kim Speese – approached Sefton to disclose their agreement with the

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[8] The results of the OCI were disclosed in Rita Amell's Expert Report (Ex. I-1) and Plaintiff's exhibits (Exs. 57, 59 & 60). The OCI has been criticized by Plaintiff's experts Jim Alampi and Chuck Russell (Exs. 53 & 54) for technical reasons–*i.e.*, due to procedural missteps in the evaluation and collection of data, including the inclusion of a non-reporting person, Dr. Bouchard, in the evaluation, and due to the choice of the evaluation method. Since the results themselves are subject to ample interpretation and criticism, the more interesting matter is how Plaintiff responded to a report she deemed as critical, particularly since the response involved subordinates who provided some of the information upon which the results were based.

OCI results and their concerns about Scott's reaction to the OCI (*i.e.*, fear of vindictive conduct by Scott). (DeVries Aff. (Ex. F), ¶ 11; Speese Aff. (Ex. G), ¶¶ 14-16.) Other employees followed the trail to Sefton and disclosed what can only be described as a history of personally abusive conduct by Scott toward her co-workers and subordinates. (Ex. N, ¶¶ 13-14; Ex. G, ¶¶ 14-16; Ex. F, ¶ 11; Exs. E17-E19; Ex. O, ¶ 6; Ex. Q at 177-78.) Though Plaintiff has generally discounted these complaints as either untrue, exaggerated and/or improperly motivated,[9] she has not discounted that Sefton was approached with the complaints of her subordinates when she was absent.

On February 11, 2002, Right Management (meaning Amell) was busy assimilating Smedes–meaning working to reassign some of Scott's staff to Smedes–in response to previous directions from Faas to Scott's subordinates about this assimilation. (Amell Aff. (Ex. I), ¶ 4.) In the course of doing so, Amell heard complaints from Scott's unit about instructions she had given them to attend the meeting for the

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[9] The Court must assume, consistent with Plaintiff's testimony, that these complaints are untrue–though the complaints tend to corroborate one another and paint a picture of a boss who ordered staff to her house for late night meetings; forced them to sit on the floor with a growling dog that sometimes bit them (even though no aid was offered); conducted Bible studies at work during work hours; eavesdropped on other executives; and treated people in a generally vindictive and callous manner. If this is fiction, it is well crafted. If this is true, then it is apparent why Faas was desirous of a change in corporate leadership.

purpose of undermining Smedes (*i.e.*, complain that he was unqualified). (*Id.*) These comments were typical of comments that Sefton had heard from Scott's subordinates--that she used rough and tumble language concerning Faas (*i.e.*, variously referring to him as Hitler, Satan, and the like).[10] (*See, e.g.*, Speese Aff. (Ex. G), ¶ 3; Griffith Aff. (Ex. P), ¶¶ 11-12.) Plaintiff has denied the various name-calling allegations, which denial the Court accepts under the dictates of Rule 56.

7. Sefton Gets Faas Involved

On February 13, 2002, Sefton spoke with Faas (who was still in Florida) and informed him of the employee complaints regarding Scott. (Sefton Aff. (Ex. G), ¶ 19.) The two agreed to meet after Faas returned from Florida (after February 25, 2002). (*Id.*) When Faas returned, he was met by a Memo from Sefton that painted the problem in terms that only a human resources person would have used:

> To: Mike Faas, President & CEO
> From: Sandy Sefton, CPO
> Date: February 26, 2002
> Re: Mary Scott
>
> ---
>
> Problem Statement Purpose
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[10] Now here is a good example of an out-of-court statement not offered to prove the truth of the matter asserted. *See* Fed. R. Evid. 801(c). That is, the statements are offered to prove that Scott is a name-caller, not to prove that Faas is Hitler or Satan.

Review difference and misunderstandings that have occurred between Mary and staff.

Desired Outcome

A. Create a safe, cooperative and professional environment, in which all employees conduct themselves professionally and are treated courteously, respectfully and with dignity.

B. To eliminate a "hostile work environment."

Issue: Management Style: Interpersonal Relationships

1. OCI depicts your leadership as reviewed by members of your team.

2. Manage by fear and intimidation.

3. Described as "when you're good, you're good" and when "you're bad, you're bad." Never know what mood you're in.

4. Try to find someone to blame/destroy.

5. Team is strong because they've banded together to support each other against fear of you.

(Ex. E-16.) The remainder of the Memo described four possible alternatives to achieve the desired outcome: (1) reassign job responsibilities; (2) do nothing; (3) develop a behavioral contract; or (4) terminate Scott.

(*Id.*) The Memo described the second and fourth alternatives as "high risk." (*Id.*) Faas received the Memo on February 26, 2002. (Faas Aff. (Ex. B), ¶ 33.)

When presented with this Memo, Faas determined that he would remove her subordinates and assign her to a temporary dead-end position (the Borgess/ Metropolitan relationship). (*Id.*, ¶ 36.) The Borgess/ Metropolitan merger relationship was exactly such a position because, as Faas knew, the Borgess/ Metropolitan merger was not going to happen. (*Id.*) Thus, Faas envisioned that Scott would be terminated by May or June of 2002. (*Id.*) However, Faas delayed announcing this change until April 17 and 22, 2002, respectively.[11] (*Id.*, ¶¶ 37-38.)

8. Let's Sue

While winds of change were swirling at Metropolitan in February 2002 around the installation of Bob Smedes and questions about the fate of existing vice presidents, including Plaintiff, Scott was, among other things, meeting with her lawyer, Linn Hinds, to contemplate how to sue Metropolitan. Attorney-client privilege has been waived as to those communications and, it is known, that on February 25, 2002, Hinds sent Scott the following email message:

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[11] April 17, 2002 was the date scheduled to inform Scott of the change and April 22, 2002 was the date to inform others and make a formal announcement.

> When we talk about the situation, we need to specifically discuss the issue of which "horse to ride." Until now, we have talked about the obvious gender discrimination slant. Your most recent information, however, contains possible seeds of a whistle blower approach. We need to evaluate the strongest approach and go on that basis, whether now or later. Linn

(Defs.' Ex. K-2.)

On April 17, 2002, as planned, Sefton met with Scott at Faas' direction and told Scott that she was being reassigned and had no choice as to the reassignment (except to resign immediately). (Sefton Aff. (Ex. E), ¶ 22 & Ex. E-19.) The day prior, Scott had sent an email to Pamela Haan, an attorney for Varnum, Riddering, Schmidt & Howlett ("Varnum" -- the firm representing Metropolitan). (Pl.'s Ex. 65, email of 4/16/02.) The email referenced a discussion they just had and apologized for "dumping that info. on you . . . ." (*Id.*) It is unclear from the email what kind of "info" was "dumped," but Plaintiff's Response characterizes the email as reflecting the disclosure of fraudulent Medicare billings. (Pl's Resp. at 52.)

On April 17, 2002, Plaintiff called attorney Jeff Fraser of Varnum. Plaintiff's Response indicates that it was a 7:30 a.m. telephone call, but fails to disclose if the call was made to Fraser's home, work or cellular telephone. (*See* Pl.'s Resp. at 52-53.) Defendants do cite record evidence concerning this event–Fraser's Affidavit, Defendants' Ex. L, ¶ 2. This evidence

indicates that the telephone call was late in the afternoon on April 17, 2002 and referenced only "significant hospital matters." (Fraser Aff. (Defs.' Ex. L), ¶ 2.) In any event, Scott called Fraser on April 18, 2002 and specifically told him that she wished to discuss "Fraud/IRS issues" and Metropolitan's application for a certificate of need. (*Id.*, ¶ 3.)

Scott's calls to Fraser were followed by meetings on Friday, April 19, 2002 at 6:30 p.m. and Saturday, April 20, 2002 at 10:30 a.m. (*Id.*, ¶¶ 3-4.) Scott's attorney (Hinds) was present for these meetings; at the meeting, it was disclosed that Scott had legal compliance concerns relating to Faas' conduct and Fraser informed Scott that her compliance concerns would be investigated and she would be protected from adverse conduct during the investigation. (*Id.*, ¶ 4; Ex. L-2 at R26-05509.) Fraser's notes of those meetings indicate that he recognized at least the potential of "whistleblower" liability given the issues asserted. (Ex. L-2 at R26-05497.) Scott posited her disclosures of compliance issues within an inelegantly titled memorandum, "Non-Exhaustive Summary of Inappropriate Practices of Metropolitan Health Corporation." (Pl.'s Ex. 67.) That document alleged corporate malfeasance including possible errors or intentional malfeasance as to Medicare billings. (*Id.* at 2.)

9. Working Under Protocols

On April 22, 2002, Faas announced Scott's job reassignment at a strategic planning meeting. (Faas Aff. (Ex. B), ¶ 38.) However, the decision did not take effect because after the meeting Fraser called Faas and informed him that Scott had made complaints to the Executive Committee of Metropolitan concerning legal compliance and, in light of such complaints, she would report only to the Executive Committee and Fraser during the investigation. (*Id.*) Faas was instructed to make no changes in the organization, to maintain all pertinent documents, and to make the Hospital (as opposed to outside offices, lawyer offices, *etc.*) his primary work location pending the investigation. (*Id.*; *see also* Fraser Aff. (Ex. L), ¶ 3.)

During the Monday, April 22, 2002, Executive Committee meeting,[12] Plaintiff and her counsel disclosed a document titled "Issues of Concern," which

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[12] Plaintiff has disagreed with Fraser's characterization that the Monday meeting was the "first" meeting between Plaintiff, Varnum attorneys and the Executive Committee. (Pl.'s Aff. in Rebuttal of Fraser (Ex. 9) at 4.) This disagreement, like much of this record, is insignificant. What Mary Scott is referring to is that one Varnum attorney, Jackie Scott, was with Fraser at the April 19-20, 2002 meetings and identified herself then as a Board Member (which she was); the parties do not disagree apparently that other members of the Executive Committee besides Jackie Scott attended the first such meeting on April 22, 2002. May God forgive us all that we have spent valuable moments of our lives with such piddling disagreements.

was a more detailed and polished version of the earlier memorandum. (Fraser Aff. (Ex. L), ¶ 5 & Ex. L-3; Ex. 68.)

Following the Executive Committee meeting, both Plaintiff and Michael Faas were required to sign "protocols" concerning the Executive Board's investigation. Scott's protocol instructed her that she would report to the Board of Directors Executive Committee on an interim basis without change in job assignments or staff, should raise any questions with either Jeff Fraser or Doyle Hayes (Board Chair), should keep the matters confidential, and should maintain all documents, emails and other materials in her control "as is." (Ex. L-4.) Scott signed the protocol indicating agreement to its terms on April 30, 2002. (*Id.*) Faas' protocol had parallel provisions: to not change Mary Scott's position pending the investigation, to treat her with dignity and respect, to maintain documents, emails and other materials "as is," to keep matters confidential, and to have "no issues related to Mary Scott change without direct discussion with and approval from me [referring to Doyle Hayes]." (*Id.*) The document was approved by Faas on April 23, 2002. (*Id.*) Fraser reviewed the protocol requirements with both Faas and Scott prior to their signatures. (Fraser Aff. (Ex. L), ¶ 6.) Fraser also told Scott not to independently investigate or acquire evidence in the workplace, to maintain confidentiality, and to "sit back" and "do her job." (Fraser Dep. (Ex. S) at 246.)

Beginning on or about April 25, 2002, Fraser and the Executive Board began work on hiring an

independent law firm to investigate Scott's "legal compliance" allegations. (*Id.*) By about May 7, 2002, the Executive Board had retained the law firm of Epstein, Becker & Green ("Epstein Becker") to investigate the "legal compliance" allegations.[13] (*Id.* See also Pl.'s Exs. 69-70.) While Epstein Becker was so employed, Fraser himself continued to investigate other matters pertinent to Plaintiff's employment, contractual complaints, and her obedience to the protocol.

Epstein Becker sent Carrie Valiant, a senior member of the firm who had literally written the book on legal issues pertaining to health care fraud. *See* C. Valiant *et al.*, *Legal Issues in Health Care Fraud and Abuse*: Navigating the Uncertainties (NHLA Focus Series 2nd ed. 1997). Valiant started by meeting with Scott on May 15, 2002. (Valiant Aff. (Ex. T), ¶ 3.) She then informed her that her "charge" was to conduct an independent investigation of the legal compliance issues Scott had asserted. (*Id.*) This work included not only investigating and reporting to the Board on legal compliance issues, but also filing required legal notices with affected governmental agencies. (*See id.*, ¶ 30.)

Despite the two pending investigations, Scott did not get the message that she should wait out the

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[13] The purpose of separate counsel was to avoid any "conflict of interest" which might arise from the fact that Varnum had previously been advising Metropolitan as to certain legal matters which were the subject of some of Plaintiff's compliance charges. (*See* Valiant Aff. (Defs.' Ex. T), ¶ 7.)

investigations without interference and while maintaining confidentiality. As mentioned above, Scott disclosed to Wiest (her personal assistant) during this time period that she had tape recordings of past meetings and intended to use the tapes to get Faas. (Wiest Aff. (Ex. H), ¶ 17.) Sefton also learned from Wiest and other employees of Scott's intent to sue Faas. (Sefton Aff. (Ex. E), ¶ 26.) On April 29, 2002, Scott was observed secretly audiotaping workplace meetings. (*Id.*, ¶ 28.) This prompted Fraser to tell Scott to knock off her performance as a secret agent, that is, stop the secret recordings. (Fraser Aff. (Ex. L), ¶ 7.)

Fraser interviewed Scott's reporting employees as part of his investigation–including Speese, VanderJagt, Devries and Wiest. These interviews generally confirmed the negative OCI information and the memorandum that Sefton had sent to Faas regarding Scott's management style. (*See id.*, ¶¶ 12-13, 15-17, 20 & Exs. L-9, L-10, L-12, & L-18.) Scott, apparently, also told others, such as Wiest, that now was not a good time to offer Fraser constructive criticisms of her in connection with his investigation. (*Id.*, ¶ 17.)

Due to growing concerns about Scott's continued copying of documents outside her direct control (*i.e.*, documents not maintained by her), Carrie Valiant repeatedly ordered Scott to not do so between May 21 and May 23, 2002. (Valiant Aff. (Ex. T), ¶¶21-23.) During this time period, Scott apparently threatened to fire Mark VanderJagt because he did not comply

with one of her document requests for financial documents. (VanderJagt Dep. (Ex. Q) at 118, 123.)

10. The Minutes

The truck load of straw that broke the camel's back in terms of Fraser's tolerance of Scott's personal investigation was Scott's treatment of audiotapes and minutes of the February 7, 2002 Metropolitan Enterprises Board meeting. On April 24, 2002, Wiest was typing the minutes of the meeting for presentation at the next Board meeting based on three tapes Wiest had recorded of the meeting. Wiest subsequently emailed the minutes to Scott and another administrative assistant (the latter person to assure the document's integrity). (Exs. H-2 & H-3.) The following day Wiest caught Scott rifling through her desk saying she was looking for the audiotapes because she believed that the minutes were inaccurate. (Wiest Aff. (Ex. H), ¶ 15.) Wiest subsequently asked Scott on several occasions to return the tapes, but the tapes were not returned. (*Id.*)

Scott, on the subject of the tapes and minutes, concedes Wiest's account for the most part (Scott Aff. in Rebuttal of Wiest (Ex. 9), ¶ 11), but adds an additional account. According to Scott, she made revisions to the memorandum from memory with the intention of later checking the tapes. (*Id.*) But she could not find all three tapes and assumed them to be recycled by others in the office. (*Id.*) Scott admits that she found a single tape containing a portion of the meeting approximately one week after June 12, 2002,

but did not disclose the tape because she felt that "Metropolitan was trying to set me up and I wanted to see just how far Metropolitan would go in creating additional lies about me.". (*Id.*) She also admits that later in the course of this suit, all three tapes (as well as other tapes) "showed up" and that this was "sheer luck." (*Id.*, ¶ 12.)

Following the "loss" of the tape, Wiest received the minutes back from Scott in an amended form on May 28, 2002. (Wiest Aff. (Ex. H), ¶ 19.) Wiest was concerned that Scott inaccurately amended the minutes and told Fraser what had occurred. (*Id.*, ¶ 18-19.)

The minutes typed by Wiest contained the following second paragraph under the caption for PHYSICIAN COMPENSATION MODEL:

> Discussion was held on when the last time the compensation model was reviewed by outside attorney to determine if it would be acceptable under Corporate Compliance. It was noted that it had been reviewed by Chris Lawrence. An Addendum was added to the document and was presented and signed by the employed physicians at the July 2001 employed physician quarterly meeting. It was also noted that this document will be presented to the Executive Committee of the Metropolitan Board of Directors annually for approval. All salaries are viewed by the Board annually. Original compensation models were derived from outside consultants with the oversight

> of Varnum, Riddering, Schmidt and Howlett with ongoing guidance for all enhancements/ improvements. Substantial changes are all presented to the Executive Committee.

(Ex. L-17 at R26-05246.)

The minutes typed by Scott and returned to Wiest included the following paragraph corresponding to the paragraph above:

> Discussion was held on when the last time the compensation model was reviewed by outside attorney to determine if it would be acceptable under Corporate Compliance. Mary requested that outside counsel review the managed Care yearly Adjustment portion of the compensation model. This element of the model had been developed by Dr. Belsito and approved by Mike outside the annual executive committee review. Mary requested that the process and resulting bonus be reviewed for appropriateness.

(*Id.* at Rule 26-05250.)

The minutes typed by Wiest included a second paragraph under the FINANCIAL OVERVIEW caption which stated:

> Action: A motion was made by Dr. William Cunningham and seconded [by] Mary Scott to approve the Metro Health Physician [C]ompensation Model (Attachment A), Resolution

> of the Board of Directors of Metropolitan Enterprises (Attachment B) and the Financial Statement (Attachment C-1, 2 & 3). Motion carried.

(*Id.* at R26-05248.)

The minutes typed by Scott deleted the entire second paragraph. (*Id.* at R26-05252.)

Other than those two very substantial differences, the minutes were the same.[14] Wiest, who had attended the meeting and listened to all of the tapes, regarded Scott's minutes as inaccurate because: (1) it omitted Scott's oral and gestured second of the compensation model motion; (2) it added a request by Scott for independent counsel review which did not occur; and (3) it modified Faas' statements as to the physician compensation model. (Wiest Aff. (Ex. H), ¶ 19.)

Scott and her counsel have explained the purpose of Scott's edits as follows: (1) to correct an errant attribution of a second to a motion (*i.e.*, Scott claims

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[14] About the same time, Fraser received another call from Wiest and VanderJagt that VanderJagt had been threatened with discharge if he did not disclose documents to Scott. VanderJagt had apparently told Scott that Fraser had directed him not to disclose the documents and Scott told VanderJagt to countermand those instructions. (Fraser Aff. (Ex. L), ¶ 22.) Scott's rebuttal affidavit does not address this paragraph. (*See* Scott Aff. in Rebuttal of Fraser (Ex. 9) at 87.)

she did not do so);[15] (2) to correct the omission of her statement requesting involvement of outside counsel perhaps conveyed during a prior meeting; and (3) to modify the record made by Faas to prevent a misapprehension of historical facts conveyed in a prior meeting relating to the physician compensation model. (*See* Pl.'s Resp. at 61-62; Pl.'s Aff. in Rebuttal of Wiest (Ex. 9), ¶ 14.) In making these explanations, though, she does not explain how an independent investigator–say a Government attorney investigating health care fraud–could have assessed the truthfulness of Faas' statements if those statements were modified to reflect Scott's intent as to what Faas should have said rather than what Faas actually did say at the meeting.

A brief review of the reporter's transcript of the meeting (which was earlier offered by Scott as evidence of what occurred) conveys the changes that Plaintiff made from the record events. (*See* Dkt. No. 425, Exs. R-20A & R-20B (also offered as Ex. 7).) The transcript treks nicely with the hearing agenda and Wiest's minutes. (*Id.*) Interestingly, though, Scott has insulted her former assistant by saying that "Wiest does not know the first thing about physician compensation models. She has no capacity to appreciate, record, or testify as to what was accurate or inaccurate about the statements that were being made by Faas . . . ." (Pl.'s Aff. in Rebuttal of Wiest (Ex. 9), ¶ 14.) The Court will

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[15] According to Plaintiff, there was no such motion and, therefore, no second to the motion. (Pl.'s Aff. in Rebuttal of Fraser (Ex. 9) at 93, ¶ 12(K).)

assume such for the purpose of this record, but all the same it is a dastardly thing to say of one's assistant, particularly since it was Mary Scott who announced the meeting with the words, "Diane's going to take the minutes." (Dkt. No. 425, Ex. R-20A at 2), referring to Wiest.

While Diane Wiest's understanding of physician compensation models may have been less acute than that of Plaintiff, the record leaves no doubt that her understanding of the purpose of the recorded minutes (to make an accurate record of what was actually said) and the use of the English language was precise. The first agenda item, discussion of the Physician Compensation Model, included the discussion referenced in Wiest's minutes concerning the use of Varnum in connection with the development of the physician model at the bottom of pages 9 and 10 of the transcript. (*Id.* at 9-10.) The transcript contains no motion by Scott to involve outside counsel there.[16] (*Id.*) The discussion of that Agenda item ends with a discussion of the *Jeffrey Askanazi* case–a matter with which this Court had more than passing experience[17]–true to Wiest's minutes. (*Id.* at 28-30.)

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[16] For the record, the Court has also reviewed the copied tapes of the meeting and believes that the transcript is true to the tapes.

[17] Askanazi's case, 1:98-cr-130, was assigned to the Honorable Robert Holmes Bell, but its companion case, *United States v. United Memorial Hospital*, 1:01-cr-238, was assigned to this Judge.

Second on the Agenda was the Corporate Compliance Program (Resolution). This was discussed at length and action (assignment of tasks to Chris Lawrence) was taken at page 38 of the transcript. (*Id.* at 38.)

Third on the Agenda was the Financial Overview. It appears from the transcript that the motion was made and approved in a tacit manner, though the transcript references are vague. Here is the relevant language:

> Doctor Cunningham: Do you need approval for this?
>
> Mary: Yeah.
>
> Mr. Faas: You read all that stuff and then I assume we need this resolution, is that the thing?
>
> Diane: Correct.
>
> Mr. Faas: Okay.
>
> Mary: Recruitment, we were–
>
> Mr. Faas: Just make that a motion, a second and an approval of that, of the financials and the physician compensation and the Corporate Compliance Program and recruitment.

(Dkt. No. 425, Ex. 20B at 46.)

Given the tacit nature of this approval, the Court must accept as true, for the purpose of this Motion, Plaintiff's contention that she did not explicitly second the motion. Nevertheless, the transcript provides certain evidence, consistent with Scott's admissions, that she made at least two very significant changes to the committee minutes which misrepresented what was said at the meeting and which, thereby, violated her protocol and her general corporate and officer duties.

11. Administrative Leave

Fraser and Valiant took their concerns about protocol violations to the Executive Committee on June 6, 2002. (Fraser Aff. (Ex. L), ¶ 23; Valiant Aff. (Ex. T), ¶ 29.) In Valiant's words, they recommended placement of Scott on paid administrative leave pending further investigation so that Scott would not be in a position to further interfere with Valiant's investigation. (Valiant Aff. (Ex. T), ¶ 29.) The Committee shared Fraser and Valiant's concerns and voted to place Scott on paid administrative leave effective June 12, 2002. (Fraser Aff. (Ex. L), ¶ 23.)

This law suit was filed on July 2, 2002.

Following Scott's placement on administrative leave, Plaintiff and Defendants' counsel engaged in some questions and answers regarding the location of the tapes and the alteration of the minutes. In one of these exchanges, Plaintiff quoted a portion of what was said at the infamous meeting. This caused Fraser to

ask Plaintiff if she had the tapes. Plaintiff then admitted that she possessed a single tape of the meeting, but refused to disclose it. (Ex. K-8; Fraser Aff. (Ex. L), ¶¶ 21-22.) It was not disclosed until Plaintiff's opposition brief filing on March 15, 2005, that Plaintiff, in fact, possessed all three tapes of the meeting.

12. Fired

In September 2002, Fraser reported to Metropolitan's Board concerning Scott. (*Id.*, ¶ 29.) Though his investigation had confirmed that Scott should be terminated for the various employer concerns noted above, *id.*, ¶ 27 & Reply Mem., Ex. B at 3, Fraser recommended in September that Scott be continued on paid leave because of the pending compliance investigation and other sensitive Metropolitan business matters. (Fraser Aff. (Ex. L), ¶ 29.) In late Fall 2002, the Executive Committee asked Fraser to show Scott the door by way of a neutral administrative reorganization affecting her and Crowley and with an offered incentive of a severance package. (*Id.*, ¶ 30.) The severance package was offered (and refused) by Scott and she was terminated effective January 30 or 31, 2003. (*Id.*)

13. History of "Protected Activities"

Against this background, there is the portrait that Scott has painted of herself as the corporate/FCA avenger. To her credit, her personnel file *per se* was kept squeaky clean and free from reprimands,

discipline and the like. (Pl.'s Ex. 42, personnel file).[18] Scott claims in her Affidavit and briefing that she donned the robes of an FCA whistleblower beginning in June or July 2001, when she undertook her new assignments to improve Metropolitan's revenue/cash flow. In that role, by Memorandum of June 26, 2001, she alerted Faas to financial areas of concern and requested additional access to financial systems. (Pl.'s Ex. 20, Rule 26-05167.)

Examination of the documentation itself does not appear especially indicative of a report of fraudulent activity, though the agenda items are so vague that they could be construed in any number of ways. The most damning reference is an isolated one to "Wound Clinic . . . Significant overbooking of unreimburseable charges." (*Id.*, Rule 26-05168.) However, even that reference does not make clear whether those charges related to federal or state reimbursement as opposed to private insurance or private payer reimbursements, nor whether the concern was legal compliance or

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[18] Though the Court will assume the best as to Plaintiff, in its experience, such clean files are common of upper management in many institutions– as to whom their only real score cards are the compensation paid them by their institutions, their involvement in law suits, and their longevity and/or history of promotion.

correct billings to insure profitability.[19] There are other references in the memo regarding services which involved federal reimbursement and/or related to federal "related party" rules; however, those references are far from transparent.[20] The reference to the Wound Clinic also did not solicit help from Faas and assigned this problem to "Finally assumed by Mary Scott." (*Id.*)

Nevertheless, Plaintiff, in her Affidavit in Rebuttal of Faas (Ex. 9, ¶¶ 29B-C), claims that she met with Faas once in June 2001, twice in July and once in August. According to Plaintiff, she told Faas that the billing problems discussed in her general documents and agenda items constituted Medicare violations with which she was uncomfortable and needed assistance to fix. (*Id.*)

On June 26, 2001, Scott sent another memo to Faas. (Pl.'s Ex. 12.) On the cover page, Scott warned Faas that "reimbursement . . .[was a] significant risk . . . [given that] the current staff are not appropriate for what we need . . . [T] he lack of ongoing analysis and . . accurate data generation is deeply disturbing." (*Id.* at R26-00544.) What follows is

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[19] According to Plaintiff's Response, at 11, the Wound Clinic involved federal reimbursement (as might be expected) and the Court also assumes based on counsel's statements, that some of the un-reimbursable charges were billed to Medicare or Medicaid. What Faas knew about any of this is a complete mystery.

[20] Plaintiff explains her interpretation of the vague agenda items on pages 16 and 17 of her Response.

another vague "issues list." (*Id.* at 2-9.[21]) The list itself presents as a series of opportunities for Metropolitan to correct its administrative and billing practices to collect more money, to document physicians' practices better to justify physician billings, and to generally fulfill better formal billing requirements necessary to bill either insurance companies or governmental payers. (*Id.*) As noted by Plaintiff's counsel, any number of these concern areas has a potential to generate false Medicare and Medicaid claims. (*See* Resp. at 13.)

Plaintiff's counsel draws special attention to items 17-22 and 28. (*Id.*) Item 22 relates to ordering services not deemed "medically necessary" because staff has billed based on faulty patient information as opposed to accurate physician information. (Pl. Ex. 12 at 6.) Item 28 relates to "patient no-show charges" and states "no-shows . . . often result in false charge[s] remaining in [the] system." (*Id.* at 7.) Items 17 includes mention of "Medicare outpatient code editor violations due to incorrect charging of pumps and monitors" as well as other "inappropriate[] charges." (*Id.* at 5.) Items 18 to 21 involve governmental documentation and regulatory requirements. (*Id.* at 5-6.) Each of those items contains the caveat "If audited, potential for fees and penalties if no documentation found." (*Id.*)

However, the document that Scott champions is unusual. It appears unedited (containing multiple

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[21] This is the reference to the pages following the cover page, as to which, the documents are not legibly Bates-stamped.

grammar errors) and incomplete–a working document that was not finished. In particular, several sections discussing "recommendations" were left blank and the document has no conclusion language to signal its end. (*Id.* at 2-9.) Faas, for his part, claims that the document was never sent to him and any discussions of "revenue cycle" or meetings with Plaintiff at the time were about "revenue cycle" *simpliciter*. (Faas Aff. (Ex. B), ¶¶ 49-50.)

As to the supposed subject matter of those meetings, Scott claims to have met with Faas to discuss the agenda items involving "illegal" billings and two sensitive matters which are not recorded in the Memo because they were "hot button" issues affecting a Board member. (Scott Aff. in Rebuttal of Faas (Ex. 9), ¶ 29D.) Those top secret areas were: (1) a lack of written orders, which is a documentation problem that can make billing illegal for Medicare purposes; and (2) the Vascular Studies arrangement Metropolitan had with two doctors (Drs. Sage and Rae), one of which, Dr. Sage, was a Board and Finance Committee Member. (*Id.*) Plaintiff does not say why the vascular billings were illegal in her brief, though it is known from the Government's Notice of Partial Intervention (Dkt. No. 25) that one Government theory was that the physicians were paid excessive compensation for interpreting vascular studies between 1995 and 2003 in violation of the Stark Law (42 U.S.C. § 1395nn). (*Id.* at 2.) Other theories of *qui tam* intervention are disclosed in the Notice, though the Government did not intervene as to all theories pled in the Complaint. (*Id.*) The *qui tam* aspect of the

suit was eventually settled for a large multi-million dollar settlement, a large bounty for which went to the Relator, Mary Scott. (*See* Dkt. No. 56; *see also* 31 U.S.C. § 3730(d).) The *qui tam* settlement order in question was entered on January 30, 2004. (Dkt. No. 63.)

Plaintiff's testimony about her top secret, undocumented meetings with Faas relating to her unfinished memos is interesting for reasons other than its sheer unlikeliness (which is interesting enough). Because the testimony presents for the first time specific testimony about prior meetings in a case in which neither discovery, deposition testimony or extensive prior court filings have previously disclosed these matters, caution must be had. Plaintiff stated in a document filed on May 13, 2005 that Plaintiff's protected activity consisted of memorandums to Faas relating to Revenue Cycle. (Dkt. No. 511 at 5.) Indeed, Defendants took Plaintiff's deposition and specifically asked whether she had any meetings with Faas about vascular studies. She said "she did not . . ." (Scott Dep. at 523, Reply Mem., Ex. B.) Regardless of the truth of such testimony, it is certain that her top secret meetings with Faas was not a topic at the Board Meeting which resulted in her termination since Board Members cannot foresee future events.

STANDARDS FOR SUMMARY JUDGMENT

Defendants' Motion is brought pursuant to Federal Rule of Civil Procedure 56. Under the language of Rule 56(c), summary judgment is proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The initial burden is on the movant to specify the basis upon which summary judgment should be granted and to identify portions of the record which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The burden then shifts to the non-movant to come forward with specific facts, supported by the evidence in the record, upon which a reasonable jury could find there to be a genuine fact issue for trial. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). If, after adequate time for discovery on material matters at issue, the non-movant fails to make a showing sufficient to establish the existence of a material disputed fact, summary judgment is appropriate.[22] *Celotex Corp.*, 477 U.S. at 323.

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[22] The mountains of discovery and filings in this suit leave little doubt that discovery has been adequate. Furthermore, Plaintiff has not presented a proper Rule 56(f) affidavit so as to warrant a continuance of the proceedings pending a later summary judgment determination. *Cacevic v. City of Hazel Park*, 226 F.3d 483, 488 (6th Cir.2000); *Ironside v. Simi Valley Hosp.*, 188 F.3d 350, 354 (6th Cir.1999).

Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences are jury functions. *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552 (6th Cir. 2000) (quoting *Anderson*); *Fur v. Sch. Dist. of City of Hazel Park*, 364 F.3d 753, 759 (6th Cir. 2004); *Adams v. Metiva*, 31 F.3d 375, 382 (6th Cir. 1994). The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in the non-movant's favor. *Celotex Corp.*, 477 U.S. at 323 (quoting *Anderson*, 477 U.S. at 255). The factual record presented must be interpreted in a light most favorable to the non-movant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Rule 56 limits the materials the Court may consider in deciding a motion under the rule: "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits." *Copeland v. Machulis*, 57 F.3d 476, 478 (6th Cir. 1995) (quoting Federal Rule of Civil Procedure 56(c)). Moreover, affidavits must meet certain requirements:

> [A]ffidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Fed. R. Civ. P. 56(e). The Sixth Circuit has held "that documents submitted in support of a motion for

summary judgment must satisfy the requirements of Rule 56(e); otherwise, they must be disregarded." *Moore v. Holbrook*, 2 F.3d 697, 699 (6th Cir. 1993); *Logan v. Denny's, Inc.*, 259 F.3d 558, 570 (6th Cir. 2001) (quoting *Moore*). Thus, in resolving a Rule 56 motion, the Court should not consider unsworn or uncertified documents, *Id.*, unsworn statements, *Dole v. Elliot Travel & Tours, Inc.*, 942 F.2d 962, 968-69 (6th Cir. 1991), inadmissible expert testimony, *North Am. Specialty Ins. Co. v. Myers*, 111 F.3d 1273, 1280 (6th Cir. 1997), or hearsay evidence, *Hartsel v. Keys*, 87 F.3d 795, 799 (6th Cir. 1996); *Wiley v. United States*, 20 F.3d 222, 225-26 (6th Cir. 1994); *Carter v. Univ. of Toledo*, 349 F.3d 269, 274 (6th Cir. 2003).

In the instant case, Plaintiff was warned by prior Order of this Court not to include matters prohibited under Rule 56(e)--hearsay statements, statements outside the affiant's personal knowledge, unattested documents and other matters not properly considered under the Rule. (*See* Dkt. No. 497 at 3.) Although Plaintiff has corrected many of its filings, some of its filings continue to violate the case law prohibiting the consideration of such evidence. As to those matters, the Court has no choice but to exclude them from consideration under Rule 56.

Additionally, Plaintiff's newest testimony concerning the vascular studies and other disclosures in meetings with Michael Faas is not properly considered under Rule 56. Under Sixth Circuit law, an affiant may not contradict previous deposition testimony to avoid the grant of summary judgment.

Penny v. United Parcel Serv., 128 F.3d 408, 415 (6th Cir. 1997); *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453, 460 (6th Cir. 1986); *see also Ross v. Bigler*, 67 F.3d 1543, 1551 (10th Cir. 1995). Application of this rule is especially proper in this context–where the proponent of the evidence has a history of litigation shenanigans, including repeatedly hiding discoverable evidence.[23] As such, the newly-minted evidence will be excluded from consideration.[24]

LEGAL ANALYSIS

1. FCA Claims

a. FCA Standards

Plaintiff has sued under Titled 31 United States Code section 3730(h). The statute provides in pertinent part:

> **(h)** Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer

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[23] Sandbagging is inconsistent with a lawyer's ethical duties and the proper conduct of discovery and its function in the court system. Moreover, the other reason for excluding such evidence is that it prevents the specter of perjury.

[24] While the Court so holds, for the record, even without such determination, this Court finds that Defendants would be entitled to summary judgment as to Plaintiff's federal claims.

> because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. . . . An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

31 U.S.C. § 3730.

Regarding a False Claims Act ("FCA") claim, the Sixth Circuit has said:

> In order to establish a claim for retaliatory discharge, a plaintiff must show: (1) he engaged in a protected activity; (2) his employer knew that he engaged in the protected activity; and (3) his employer discharged or otherwise discriminated against the employee as a result of the protected activity.

Yuhasz v. Brush Wellman, Inc., 341 F.3d 559, 566 (6th Cir. 2003) (citing *McKenzie v. BellSouth Telecomm., Inc.*, 219 F.3d 508, 513-14 (6th Cir. 2000)).

Furthermore, this is the kind of claim which is subject to the burden-shifting analysis under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973) and its progeny. *See, e.g., Norbeck v. Basin Elec. Power Co-op*, 215 F.3d 848, 849-50 (8th

Cir. 2000); *United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 736 n.4 (D.C. Cir. 1998) (citing Senate Report language).[25]

Regarding the "protected conduct" element of the tort, activity is protected if it has at its "nexus the 'in furtherance prong' of an FCA action." *McKenzie v. BellSouth Telecomm., Inc.*, 219 F.3d 508, 515 (6th Cir. 2000). The activity must "relate to 'exposing fraud' or 'involvement with a false claims disclosure.'" *Id.* at 516. Though formal words or knowledge of a *qui tam* action is not required, there must be some nexus with either a *qui tam* action or fraud action against the federal government. *Id.* Internal reporting may constitute "protected activity," but the report must itself allege fraud on the federal government. *Id.*

Furthermore, where the whistleblower is, as in this case, a corporate officer with assigned legal compliance responsibilities, the corporation must receive heightened notice that the employee intended to further a *qui tam*/FCA action rather than merely warning the defendant of the consequences of its conduct. *Yuhasz*, 341 F.3d at 567. The *Yuhasz* Court considered this question in detail and its words are worthy of notice:

> In [*United States ex rel.*] *Ramseyer [v. Century HealthCare Corp.]*, the Tenth Circuit dismissed a

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[25] Although the Court will employ the burden-shifting analysis, the Court also believes that summary judgment would be appropriate even in the absence of a burden-shifting analysis.

retaliatory discharge action brought pursuant to the FCA, noting that "the monitoring and reporting activities described in plaintiff's complaint were exactly those activities plaintiff was required to undertake in fulfillment of her job duties." 90 F.3d 1514[,] 1523 [(10th Cir. 1996)]. The court added that the plaintiff "took no steps to put defendants on notice ... that she was furthering or intending to further an FCA action rather than *merely warning the defendants of the consequences of their conduct.*" *Id.* (emphasis added).

Similarly, the concerns about potential liability under the FCA raised by Yuhasz in this case were entirely within the scope of his duties, and thus did not put Brush on notice that he was engaging in protected activity. The complaint describes Yuhasz's duties as follows:

[Brush] hired Yuhasz to design and establish, and then operate as a manager, a testing laboratory for its Lorain facility.... The laboratory was established to conduct certain chemical, mechanical and physical testing. Yuhasz also established the specifications for the laboratory equipment.

* * *

Yuhasz conducted and or supervised testing procedures for [Brush's] Lorain facility.

* * *

On or about August, 1998, Yuhasz was appointed as the [Brush] employee charged with submitting

the required certifications of compliance with the technical specifications of the alloys.

By informing Brush that its certifications were illegal and that other companies had incurred liability under the FCA for false claims, Yuhasz was simply performing his ordinary duties as a supervisor of laboratory testing. Brush cannot be charged with notice on this basis. *See Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 952 (5th Cir. 1994) (employer did not have notice where plaintiff's actions "were consistent with the performance of his duty"). The mere fact that Yuhasz told Brush that its certifications of compliance were "unlawful and illegal" does not establish notice. As the Sixth Circuit noted in *McKenzie II*, "a plaintiff still must show that his employer was aware of his protected activity. Merely grumbling to the employer about ... regulatory violations does not satisfy the requirement." 219 F.3d at 518 (quoting *United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 743 (D.C. Cir.1998)).

Yuhasz argues that this interpretation of the notice requirement "grants immunity to an employer who terminates the employee most likely to have information relevant to a *qui tam* action." This is not the case. As the court noted in *Ramseyer*, employees charged with investigating potential fraud are not automatically precluded from bringing a Section 3730(h) action. 90 F.3d at 1523 n.7. In light of their ordinary responsibilities,

> however, such persons "must make clear their intentions of bringing or assisting in an FCA action in order to overcome the presumption that they are merely acting in accordance with their employment obligations." *Id.*

Yuhasz, 341 F.3d at 567-68.

Once "notice of protected activity" and the other elements of an FCA retaliation claim are proven by a preponderance of the evidence, under the *McDonnell Douglas* burden-shifting analysis, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, 411 U.S. at 802. Assuming that the employer does so, then the burden shifts back to the employee to show that the proffered reason was pretextual. *Id.* at 802.

Under Sixth Circuit law, pretext may be proven in one of three ways:

> To make a submissible case on the credibility of his employer's explanation, the plaintiff is "required to show by a preponderance of the evidence either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate his discharge, or (3) that they were *insufficient* to motivate discharge." *McNabola v. Chicago Transit Authority*, 10 F.3d 501, 513 (7th Cir. 1993) (emphasis added and quotation marks omitted).

Manzer v. Diamond Shamrock Chem. Co., 29 F.3d 1078, 1084 (6th Cir. 1994); *see also Smith v. Legget Wire Co.*, 220 F.3d 752, 759 (6th Cir. 2000) (following *Manzer*).

Further, the Sixth Circuit has imposed an additional rule when the employee seeks to establish that the reason for discharge had no basis in fact. Under the Circuit's holdings in *Smith v. Chrysler Corp.*, 155 F.3d 799, 806-07 (6th Cir. 1998) and *Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1116-17 (6th Cir. 2001), the employee must prove not only that the employer's justification was false, but also that the employer lacked "an honest belief" as to the truthfulness of the justification. Here are the Circuit's words:

> This Court has adopted an "honest belief" rule with regard to an employer's proffered reason for discharging an employee. *Smith v. Chrysler Corp.*,155 F.3d 799, 806-07 (6th Cir. 1998). Under this rule, as long as an employer has an honest belief in its proffered nondiscriminatory reason for discharging an employee, the employee cannot establish that the reason was pretextual simply because it is ultimately shown to be incorrect. *Id.* at 806. An employer has an honest belief in its reason for discharging an employee where the employer reasonably relied "on the particularized facts that were before it at the time the decision was made." *Id.* at 807.

Majewski, 274 F.3d at 1117.

b. Analysis of Scott's FCA Claim

As the above exposition makes plain, proof of an FCA claim is a somewhat daunting task. The record in Scott's case fails those standards utterly.

To begin, the memoranda that Scott allegedly sent in the Summer of 2001, similar to the notifications in *Yuhasz*, were insufficient to give Metropolitan notice of protected activity. Scott was at the highest echelons of corporate management with assigned responsibilities for billing, coding and legal compliance. In that light, her memoranda and her discussions with Faas consistent with the tone of her memoranda were insufficient to prove notice of protected activity.

It is clear that Scott did give adequate notice of false claims in April 2002. However, on Scott's own theory, Faas had already determined to terminate her before April 2002. Under these circumstances, Scott's theory of protected activity cannot succeed.

Furthermore, there is an even more basic causal problem for Scott's theory of liability. The causal chain between the "protected activity" and discharge was broken asunder when she brought her protected activity to the attention of Fraser in April 2002. This act saved her from termination by Faas and essentially gave her new supervisors–the Board and Fraser. Fraser made his later recommendations for Board action and the Board so acted not based on any protected conduct, which was explicitly not considered,

but based on concerns about legitimate employee misconduct.[26]

Assuming for the moment that Plaintiff could prove a *prima facie* case, summary judgment for Defendants is also warranted by the established record of employee misconduct.

In this case, Plaintiff has admitted facts which establish beyond any genuine issue of material fact that she wrongly altered corporate records and that she withheld from the corporation tapes evidencing corporate minutes. The withholding of the tapes was not "protected conduct" as argued by her counsel since she and her counsel were free to make arrangements with independent counsel for the safeguarding and/or copying of the tapes so as to protect her legitimate interests in the evidence. Moreover, the alteration of the corporate minutes was not only bad conduct, it was a crime under Michigan and common law.

Michigan law provides:

> An officer or agent of a corporation who knowingly falsifies or wrongfully alters the books, records, or accounts of a corporation is guilty of a misdemeanor

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[26] Plaintiff has made arguments that she was somehow wronged because Fraser did not pass on her arguments to the Board. There is no precedent or other legal support for this argument. Plaintiff was not a public employee with a right to a due process hearing. She was an officer serving at the will of her Board.

> and is subject to a fine of not to exceed $1,000.00 for each such offense.

Mich. Comp. Laws § 450.1932(2). *See also Peters v. Egnor*, 888 F.2d 713, 720 (10th Cir. 1989) (holding that falsification of corporate minutes was forgery under Colorado and British law); *United States v. Kenrick*, 221 F.3d 19, 30 (1st Cir. 2000) (upholding prosecution for alteration of corporate minutes).

Plaintiff's own admissions–that she altered the minutes to make them true in some sense to a prior meeting–does not establish even a legal defense to a criminal charge. Under Michigan law, proof that a criminal defendant acted knowingly is sufficient evidence to convict of a criminal offense requiring a *scienter* element of "knowing" conduct; the fact that a defendant may have been motivated by an altruistic or pure motive is irrelevant. *See People v. Medlyn*, 544 N.W.2d 759, 761 (Mich. Ct. App. 1996); *People v. Harrell,* 221 N.W.2d 411, 416 (Mich. Ct. App. 1974).

Finally, forgetting for the minute the undisputed and indisputable evidence of wrongful workplace conduct, Plaintiff also fails to make a showing to establish that the reasons for termination were pretextual. In this case, the decision makers were the Board and Fraser, independent from Faas. There is no evidence raising a serious doubt that the Board lacked a "reasonable belief" as to the manifold reasons for discharging Plaintiff–*i.e.*, falsification of evidence, concealment of evidence, insubordination as to Fraser, refusal to obey the protocol, inappropriate conduct as

to management assessment, verbal abuse of colleagues, efforts to manipulate management assessments, disparaging fellow officers, and threatening to retaliate against staff to name a few reasons. This is a mountain not a mole hill.

For each of these reasons, Defendants are entitled to summary judgment as to Plaintiff's FCA claims.

2. State Law Claims

What remains–claims for breach of contract and defamation--have been brought under state law and specifically pursuant to the Court's supplemental jurisdiction under 28 U.S.C. § 1367. (*See* Rev. Sec. Amend. Comp., ¶ 3.) This is significant since with the dismissal of the federal claims, the Court must determine whether or not to retain jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(c)(3).

As specified in § 1367 and in the common law–cases such as *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966), even after federal claims are dismissed in suit, the federal court retains subject matter jurisdiction over state law claims subject to its own judgment as to whether to exercise such jurisdiction. While such is discretionary, the strong federal custom since *Gibbs* has been to dismiss those claims in order to permit state courts to decide their own law, as is their prerogative.

The history and operation of this statute was explained by the Sixth Circuit in *Musson Theatrical,*

Inc. v. Federal Exp. Corp., 89 F.3d 1244, 1254 (6th Cir. 1996):

> However, there is a second problem with the district court's assertion of supplemental jurisdiction over the unpled state law claims. On the particular facts of this case, it was an abuse of discretion to retain the state law claims on a theory of supplemental jurisdiction after dismissal of the federal claims upon which supplemental jurisdiction depended. *United Mine Workers v. Gibbs,* 383 U.S. 715, 726, 86 S. Ct. 1130, 1139, 16 L.Ed.2d 218 (1966) established the doctrine of supplemental jurisdiction as a matter of federal common law. Essentially, *Gibbs* held that a federal court can decide a state law claim that forms part of the same "case or controversy" as a claim over which the court has jurisdiction. *Ibid.* Since *Gibbs,* federal courts have expanded and shaped the doctrine of supplemental jurisdiction by applying it to new circumstances.
>
> In 1990, Congress passed a supplemental jurisdiction statute, now codified at 28 U.S.C. § 1367. Although § 1367 overruled *Finley v. United States,* 490 U.S. 545, 109 S. Ct. 2003, 104 L.Ed.2d 593 (1989) (restrictions on jurisdiction over third parties), the statute affirmed *Gibbs,* as interpreted by subsequent federal courts, as the proper measure of federal supplemental jurisdiction. . . .
>
> A district court has broad discretion in deciding whether to exercise supplemental jurisdiction over

state law claims. *Transcontinental Leasing, Inc. v. Michigan Nat'l Bank of Detroit,* 738 F.2d 163, 166 (6th Cir. 1984). That discretion, however, is bounded by constitutional and prudential limits on the use of federal judicial power. *Gibbs* itself expressed one of the most important of these limits: "Certainly, if the federal claims are dismissed before trial, even though [the federal claims are] not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *Gibbs,* 383 U.S. at 726, 86 S.Ct. at 1139.

The word "certainly" was effectively erased by *Rosado v. Wyman,* 397 U.S. 397, 90 S. Ct. 1207, 25 L.Ed.2d 442 (1970). There the Court held that a district court did not abuse its discretion in retaining jurisdiction over supplemental state law claims after it dismissed the touchstone federal claim for mootness before trial. 397 U.S. at 405, 90 S. Ct. at 1214. *Rosado* held that there is no categorical rule that the pretrial dismissal of a federal claim bars a court from deciding remaining state law claims. *Ibid.* Instead, the decision depends on "judicial economy, convenience, fairness, and comity." *Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343, 350, 108 S.Ct. 614, 619, 98 L.Ed.2d 720 (1988). This approach was codified at 28 U.S.C. § 1367(c)(3), which provides that a district court "may" (rather than must) decline to exercise jurisdiction if "the district court has dismissed all claims over which it has original jurisdiction."

Musson Theatrical, Inc., 89 F.3d at 1254. Further, the *Musson* Court specified that when federal claims are dismissed as part of a Rule 12(b)(1) or 12(b)(6) motion, then the district courts should exercise their jurisdiction to dismiss the remaining state law claims except in certain narrow and limited "unusual circumstances." *Id.*

In the instant case, the federal dismissal was not made as part of a 12(b)(1) or 12(b)(6) motion such that the Court retains its discretion as to whether the state law claims should be dismissed. This is an unusual circumstance in that the state law claims have been long pending. Thus, the fact or of judicial economy does favor their resolution by this Court.[27] However, this is also a suit in which the parties are well represented and motivated to raise in fine detail the various aspects of state law presented in the breach of contract and defamation claims. This means that the state law issues presented provide the state courts with a rare opportunity to define and clarify their own laws. In other words, the interests of comity are especially strong in this case. "Comity" as defined by *Black's Law Dictionary,* means the "courtesy among political entities . . . involving especially mutual recognition of legislative, executive and judicial acts." *Black's Law Dictionary* at 261 (7th ed. 1990). This courtesy must appreciate the state courts' primary role in

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[27] The interests of fairness and convenience balance equally between the state and federal courts since state fora would provide an equally fair and convenient opportunity for the resolution of the state law claims.

adjudicating state law controversies and the federal courts' long term commitment to that project.

In this case, the process and role of comity has been delayed too long and should be made to work forthwith.[28]

Therefore, the state law breach of contract and defamation claims will be dismissed without prejudice pursuant to 28 U.S.C. § 1367(c)(3).

CONCLUSION

For the reasons given, Defendants' Motion for Partial Summary Judgment will be granted in part and denied in part. Summary Judgment shall enter as to the federal law claims and the state law claims shall be dismissed without prejudice pursuant to 28 U.S.C. § 1367(c)(3).

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[28] Due to the late dismissal of the state law claims, the Court will, however, for the benefit of the state courts and for the purposes of further review, express its own opinion as to the state law claims (excepting the breach of contract/matching contribution claim). The Court's opinion is that Defendants' partial summary judgment motion should be granted as to the state law issues by the state courts. For the purpose of appellate review, the Court also indicates that it concurs with Defendants' other arguments in their briefing to the extent that those matters were not specifically addressed herein.

The suit is o'er,
Go on your way,
Deeds reflected,
In the light of day!

/s/ Richard Alan Enslen
RICHARD ALAN ENSLEN
UNITED STATES DISTRICT JUDGE

DATED in Kalamazoo, MI:
June 23, 2005

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:02-CV-485

[Filed June 23, 2005]

UNITED STATES OF AMERICA,
ex rel. MARY SCOTT,
Plaintiff,

v.

METROPOLITAN HEALTH CORPORATION,
d/b/a METROPOLITAN HOSPITAL,
a Michigan corporation,

and

MICHAEL FAAS,
an individual, jointly and severally,
Defendants.

JUDGMENT

In accordance with the Opinion of this date;

IT IS HEREBY ORDERED that Defendants Metropolitan Health Corporation and Michael Faas's Renewed Motion for Partial Summary Judgment (Dkt. No. 507) is **GRANTED IN PART AND DENIED IN PART**.

IT IS FURTHER ORDERED that summary judgment is **GRANTED** in favor of Defendants and against Plaintiff Mary Scott as to all Plaintiff's federal law claims, which claims are **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that all remaining state law claims are **DISMISSED WITHOUT PREJUDICE** pursuant to 28 U.S.C. § 1367(c)(3).

/s/ Richard Alan Enslen
RICHARD ALAN ENSLEN
UNITED STATES DISTRICT JUDGE

DATED in Kalamazoo, MI:
June 23, 2005

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 05-2642

[Filed February 1, 2007]

MARY SCOTT,
Plaintiff-Appellant,

v.

METROPOLITAN HEALTH CORPORATION,
d/b/a METROPOLITAN HOSPITAL,
a Michigan corporation,

and

MICHAEL FAAS,
an individual, jointly and severally,
Defendants-Appellees.

[Excerpt From Amicus Brief of National Employment Lawyers' Association, Pages 14-20]

* * *

[page 14]

C. Entry of Sanction Without an Evidentiary Hearing Violated Due Process

The Fourteenth Amendment to the U. S. Constitution, Section 1, second sentence, states as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

By entering a monetary judgment against Scott, the trial court is depriving her of property. The district court's judgment overtakes Scott's share of the qui tam settlement and deprives her of her statutory right to a share of that award. Particularly where the alleged underlying facts are either wrong or disputed, and certainly the appropriate amount of any sanction was disputed, those disputes needed an evidentiary hearing for resolution. The trial court, therefore, must afford her due process before entry of such judgment.

The "basic thrust" of the due process clauses is a requirement for notice and an opportunity to be heard. *Goss* v. *Lopez* (1975), 419 U.S. 565, 95 S.Ct 729, 42 L.Ed.2d 725; *Fuentes v. Shevin* (1972), 407 U.S. 67, 92

S.Ct. 1983, 32 L.Ed.2d 556; *see also Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("[T]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.") (internal quotation omitted). These procedural safeguards reflect "the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." *Fuentes*, 407 U. S. at 81.

Entry of sanctions without a hearing adds to the trepidation prospective plaintiffs must feel when they decide whether to come forward with their claims of employer misconduct. Entry into the judicial system will no longer be a place for resolution of disputes based on evidence and fair play, but rather a gamble about which judge will be assigned, and what reaction that judge may have to your claim. Due Process is the foundation of public trust in our judiciary. Without it, our government cannot accomplish the public purpose of any remedial law.

1. The District Court Erred in Making a Finding about Scott's Intent without a Hearing.

Subjective bad faith should be the litmus test for an award of any sanctions against counsel, particularly in employment and civil rights cases. As the Supreme Court has stated, "(u)nlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely

in monetary terms." *Blanchard v. Bergeron,* 489 U.S. 87, 96 (1989) quoting *City of Riverside v. Rivera,* 477 U.S. 561, 574 (1986) (plurality opinion). That a subjective bad faith standard should be required is evident from the statutory language itself; from interpretations by Congress during efforts in 1980 to obtain certain ameliorating amendments to § 1927; and from recent case law in ths Circuit. *See* George Cochran, *The Reality of "A Last Victim" and Abuse of the Sanctioning Power,* 37 LOY.L.REV. 691,713-24 (2004) (status of current case law and legislative history).

Thus, in 1968, *Kiefel v. Las Vegas Hacienda, Inc.,* 404 F.2d 1163 (7th Cir. 1968) interpreted § 1927 liability to hinge on whether the conduct in question reflected a *"serious and studied disregard for the orderly processes of justice." Kiefel,* 404 F.2d at 1167 (emphasis added). In 1980, *Kiefel* was cited by witnesses in Congressional hearings in which an easing of the standard for sanctions awards was under consideration. *See Antitrust Procedural Improvement Act of 1979: Hearings on S.390 before the Subcomm.. On Antitrust & Monopoly of the Senate Comm. on the Judiciary,* 96th Cong., 1st Sess. at 8, 27 (1979); *Antitrust Procedural Improvements and Jurisdictional Amendments: Hearings on H.R. 4047 before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary* 96th Cong., 1st Sess. at 23, 60, 152 (1979). The effort to amend § 1927 failed. In a speech on the House floor, Congressman Mazzoli explained the legislators' conclusions:

> The managers on the part of the House were firm in their resolve to maintain the tough standard of current law so that the legislation in no way would dampen the legitimate zeal of an attorney in representing a client.

See 126 CONG. REC. 23625-26 (1980). The Congressional determination to preserve a high bar for the imposition of sanctions is reflected in decisions from this Circuit. In *Avirgan v. Hull,* 932 F.2d 1572 (11 th Cir. 1991) the Eleventh Circuit held that § 1927 allows district Courts to "assess attorney's fees against litigants, counsel, and law firms who ***willfully*** abuse judicial process by conduct tantamount to bad faith." *Id.* at 1582 (emphasis added); *see also Malautea v. Suzuki Motor Co., Ltd.,* 987 F.2d 1536, 1544 (11 th Cir. 1993)(§ 1927 sanctions are reserved for counsel "who willfully abuse the judicial process"). Likewise, in *Schwartz v. Millon Air, Inc.,* 341 F.3d 1220 (11 th Cir. 2003), the Court acknowledged the holding in *Avirgan* and concluded that, for purposes of § 1927, "[a] determination of bad faith is warranted where an attorney ***knowingly or recklessly*** pursues a frivolous claim . . ." *Id.* at 1225.

In light of these analyses, NELA submits that this Circuit should accord with the rulings of those other Circuits holding that subjective bad faith is a prerequisite to liability under § 1927. *See United States v. Blodgett,* 709 F.2d 608, 610 (9th Cir. 1983) (§ 1927 requires a finding that counsel acted recklessly or in bad faith); *Optyl Eyewear Fashion Int'l Corp. v. Style Cos., Ltd.,* 760 F.2d 1045, 1048 (9th Cir. 1985)

(section 1927 requires a showing of intent, recklessness or bad faith); *Suslick v. Rothschild Secs. Corp.*, 741 F.2d 1000, 1006 (7th Cir. 1984) (§ 1927 requires subjective bad faith by the attorney); *Baker Indus., Inc. v. Cerberus,* 764 F.2d 204, 208 (3d Cir. 1985) (bad faith is a necessary predicate to liability under § 1927); *Oliveri v. Thompson,* 803 F.2d 1265, 1273 (2d Cir. 1986) ("an award made under § 1927 must be supported by a finding of bad faith"); *Hilton Hotels Corp. v. Banov,* 899 F.2d 40, 45 n. 9 (D.C.Cir. 1990)("[u]nlike Rule 11 ... section 1927 applies only when the attorney acts in **subjective bad faith**"); *U.S. v. Int'l Bhd. of Teamsters,* 948 F.2d 1338, 1346 (2d Cir. 1991) (same) *Hackman v. Valley Fair,* 932 F.2d 239, 242 (3d Cir. 1991)(same).

The district court entered judgment without a hearing. Summary judgment is a permissible means of entering judgment without a hearing. The law on summary judgment is instructive on the circumstances when a trial court can rule on claims without a hearing. The Supreme Court has stressed on numerous occasions that in considering motions for summary judgment, a court "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 150-151 (2005) (citing *Lytle v. Household Mfg., Inc.* 494 U.S. 545, 554-555 (1990), *Anderson v. Liberty Lobby*, 477 U.S. 242, 254 (1986), *Continental Ore Co. v. Union Carbide & Carbon*, 370 U.S. 690, 696, n. 6 (1962)). "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts

are jury functions, not those of a judge." *Id.*, *quoting Liberty Lobby*, 477 U.S. at 255; *Accord, Fuhr v. School District of HazelPark*, 364 F.3d 753 (6th Cir. 2004). The Court "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves* at 151. The "court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.'" *Id.*, *quoting Liberty Lobby* at 300, emphasis added. See also, *Logan v. Denny's, Inc.*, 259 F.3d 558, (6th Cir. 2001) (district court wrongly adopted defendant's version of the facts and ignored plaintiffs evidence showing there to be a factual dispute). If satisfaction of an essential element of a claim is at issue, however, the jury is the proper trier of contested facts. *Arbaugh v. Y & H Corp.*, — U.S, —, 2006 U.S. LEXIS 18193 (February 22, 2006) (citing *Reeves v. Sanderson* at 150-151. The Sixth Circuit particularly has indicated its disapproval with summary judgment where there are allegations of discrimination and issues of intent and motive. *Lenz v. Erdmann Corp.*, 773 F.2d 62, 64 (6th Cir. 1985); see also *Wexler v. White's Fine Furniture*, 317 F.3d 564 (6th Cir. 2003) (*en banc*).

To delve past the objective facts and make an inference about Scott's intention to withhold evidence requires a hearing. It was a abuse of discretion for the district court to make this finding without offering her the opportunity to testify in person.

2. The District Court Erred in Determining the Amount of the Sanction Without an Evidentiary Hearing.

When sanctions are appropriate, they serve the purpose of showing the offending party what are the true costs of their misconduct. Sanctions that are higher than the victims' actual costs flowing from the improper conduct are punitive.

The district court's failure to conduct a hearing on the correct amount of sanctions in this case reveals that the district court's purpose was something other than compensating the Hospital for the actual costs incurred as a result of Scott's alleged misconduct. Scott must not be punished for bringing a successful action challenging fraudulent claims to the government.

* * *

APPENDIX J

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 05-2642

[Filed May 16, 2006]

MARY SCOTT,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
METROPOLITAN HEALTH CORPORATION,	)
d/b/a METROPOLITAN HOSPITAL,	)
a Michigan corporation,	)
	)
and	)
	)
MICHAEL FAAS,	)
an individual, jointly and severally,	)
Defendants-Appellees.	)
	)

[Excerpt From Final Brief of Defendants-Appellees, Page 61]

* * *

[page 61]

Plaintiff contends nonetheless that the District Court abused its discretion by not granting her an evidentiary hearing before making its decision. The argument begs the question of what such a hearing could possibly accomplish when, as here, the facts of Plaintiff's misconduct are beyond dispute. However, it also misapprehends Plaintiff's rights in this regard as clearly articulated by this Court in *Wilson-Simmons v. Lake County Sheriff's Dept., supra* (affirming an award of sanctions based solely upon submission of written briefs and holding, "In this circuit, there is no requirement that a full evidentiary hearing be held before imposing sanctions.") There was no abuse of discretion by the District Court in its process or conclusion.

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 05-2642

[Filed May 11, 2006]

MARY SCOTT, Plaintiff-Appellant, v. METROPOLITAN HEALTH CORPORATION, d/b/a METROPOLITAN HOSPITAL, a Michigan corporation, and MICHAEL FAAS, an individual, jointly and severally, Defendants-Appellees.	)

[Excerpt From Final Brief of Plaintiff-Appellant, Pages 50-51]

* * *

[page 50]

B. The District Court Committed Reversible Error When It Ruled Pursuant to Rules 26(g)(3) and 37(c) — Without Even Holding an Evidentiary Hearing — that Mary Scott Intentionally Concealed Evidence (Audio Tapes) During Discovery When the Objective Evidence Clearly Establishes Otherwise

The District Court's finding — without an evidentiary hearing — that Mary Scott intentionally concealed audio tapes during discovery is contrary to the record developed in this case; is a monumental abuse of discretion; and, must be reversed. There is absolutely no evidence in the record or otherwise proffered by Metropolitan or Faas that Mary Scott concealed in any way any of the audio tapes involved in this case, including the February 7, 2002 tapes which the District Court deemed to be the tapes which "doomed" Mary Scott's case.

The District Court's ruling regarding Mary Scott's alleged concealment of the tape recordings of the February 7, 2002 board meeting is quite simply not supported by the record. Rather, the objective record establishes that Mary Scott produced to Metropolitan and Faas professionally made copies of the February 7, 2002 tapes during the discovery phase of this case.

* * *

APPENDIX L

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:02-CV-485

[Filed October 10, 2005]

MARY SCOTT,
Plaintiff,

v.

METROPOLITAN HEALTH CORPORATION,
d/b/a METROPOLITAN HOSPITAL,
Michigan corporation,

and

MICHAEL FAAS,
an individual, jointly and severally,
Defendants.

SUPPLEMENTAL AFFIDAVIT OF AMY BROWN

STATE OF MICHIGAN)
)SS
COUNTY OF OAKLAND)

I, Amy Brown, state as follows:

1. For record keeping purposes, I marked the tapes that were represented to me to be the 2/7/02 meeting minutes as #2724, which is Tape I (by reference to the Complete Transcript, Tape I corresponds to the first part of the meeting); as #2725, which is Tape II (by reference to the Complete Transcript, it corresponds to the middle of the meeting); and #2726, which is Tape III (by reference to the Complete Transcript, it corresponds to the last part of the meeting).

2. On July 8, 2004, I submitted the entirety of Tapes I, II, and III to IKON for a complete identical reproduction of the same. I did not instruct IKON to only reproduce parts of Tapes I, II, and/or III. I ordered 2 sets of copies of Tapes I, II, and III from IKON.

3. The next day, IKON returned the original Tapes I, II, and III and 2 sets of copies of Tapes I, II, and III. I did not listen to the copies that came back from IKON to determine whether they were exact copies of the original Tapes I, II, and III. I assumed that IKON was a reputable professional copying service and that the copies were what I had ordered: Complete copies of Tapes I, II, and III.

4. I retained one set of copies of Tapes I, II, and III for our records and mailed another set to Defendants.

5. As far as I can tell from listening to the copies I retained and following them along the Complete Transcript, our copies of Tapes I, II, and III are identical to the original Tapes I, II, and III. In other words, IKON did not make any copying error with our copies.

6. I am the custodian of records for the above-captioned case. I have never received from Mary Scott or anyone at Frank, Haron, Weiner and Navarro, nor processed for reproduction or production to Defendants in this case, any tapes of CDs which combine the contents of Tapes I, II, and III into one tape or CD. The only time I have seen the contents of said Tapes combined into one was in relation with Defendants' submission of a CD to us. Except for Defendants' CDs, therefore, and to the best of my knowledge, Tapes I, II, and III have always occupied one tape or CD each and have never been combined by anyone at this firm.

7. On or about 1/31/05, I was working on transcribing the 2/7/02 Tapes. The e-mail correspondence to which the Court refers in its Opinion, Dkt 606, has nothing to do with anyone at this firm working with Mary Scott to enlarge, reduce, or manipulate in any way the contents of Tapes I, II, and III. It was related to my lacking the identity of the speakers in the transcript that I was attempting to generate and Ms. Scott volunteering to identify the voices and the speakers. Ultimately, I was asked to order and/or obtain a certified transcript of the 2/7/02 Tapes from a court reporter on or about February 14, 2005.

8. I am competent to testify to these facts if called upon to do so.

/s/_____
Amy Brown

Subscribed and sworn to before me
this 10TH day of October, 2005

/s/_____
Joan M. Veihl
Genesee County, Michigan
Acting in Oakland County
My Commission Expires: 06/13/2011

APPENDIX M

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:02-CV-485

[Filed July 25, 2005]

UNITED STATES OF AMERICA *ex rel.* MARY SCOTT,
Plaintiff,

v.

METROPOLITAN HEALTH CORPORATION, d/b/a METROPOLITAN HOSPITAL, a Michigan corporation,

and

MICHAEL FAAS,
Defendants.

[Excerpt from BRIEF IN SUPPORT OF DEFENDANTS' BILL OF COSTS AND MOTION FOR ATTORNEYS' FEES, EXPENSES, AND NON-TAXED COSTS AS SANCTION, Pages 16-17]

* * *

[page 16]

Often in cases such as this, the proverbial "swearing contest" is resolved without demonstrable evidence that one party knew from the beginning that the facts they contested were true; this, however, is not the typical case.[48] In this case, Plaintiff knew all along that the factual basis for Metropolitan's actions were true and accurate, that her allegations were completely undermined by the evidence – evidence she altered, destroyed, suppressed, misrepresented, or

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[48] Defendants ask the Court to note that this is *not* a summary judgment motion and, consequently, Plaintiff is not entitled to the same presumptions and inferences she was on summary judgment. While Plaintiff was protected during the summary judgment phase of this litigation by a standard that required the Court to resolve all factual disputes in her favor, that protection has now ceased, and Plaintiff's conduct can be evaluated within the context of the litigation and period of time immediately prior to its filing. In so doing, the Court is under no obligation to defer findings of fact to the jury. The Court alone holds that role at this point.

otherwise mishandled and manipulated – and consequently, that her claim was frivolous.[49]

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[49] In this case, there are multiple reasons to let the entire responsibility for this misconduct fall upon Plaintiff -- (1) it was Plaintiff, not the lawyers, who actively hid, destroyed, or altered the various tapes; (2) it was Plaintiff, not the lawyers, who drafted the *eighteen* affidavits (**Dkt.464-79, 552-53, 565**) that she filed in this case; (3) it was Plaintiff, not the lawyers, who received more than $1,000,000 from Defendant as the "relator's share" of the *qui tam* settlement (*see* Note 24, *supra*); and (4) it was Plaintiff, not the lawyers, who was really controlling the litigation as her history of manipulating and lying to her lawyers – including Honigman Miller (*see* Note 23, *supra*) and Sommers Schwartz (**Dkt.40-6, Ex.E** (Plaintiff/Relator's Response and Brief in Opposition to Emergency Motion to Stay Distribution of Settlement Proceeds Et Seq.), attached for the Court's convenience as **Exhibit K**) – demonstrates. Moreover, because Defendants cannot say with any degree of certainty precisely when Plaintiff's attorneys knew that her claim was frivolous, Defendants are not seeking an order which directs Frank, Haron, Weiner and Navaro or Plaintiff's husband, Mark Scott to pay Defendants' attorney fees. Having said that, on March 14, 2005, Plaintiff's attorneys filed a certified transcript of the February 7, 2002 meeting which demonstrated, indisputably, that (1) Plaintiff had, in fact, all three tapes of the meeting in her possession despite her earlier denials and failure to produce them in discovery, and (2) Defendant's proffered legitimate non-retaliatory reason for Plaintiff's discharge regarding Plaintiff's manipulation of the minutes of that meeting was true. **Dkt.421, R-20A&B**. At that point, Plaintiff's attorneys knew what Plaintiff had known since the beginning – that she had, in fact, fraudulently altered the February 7, 2002 Enterprise Board Minutes, and consequently, one of Defendant's legitimate nonretaliatory reasons for discharge was unassailable. In the 6th Circuit, "[a]n

* * *

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award [under 28 U.S.C §1927] is warranted if an attorney engaged in conduct from an objective standpoint that 'falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party.' . . . While *a showing of bad faith is not required*, the attorney's conduct must amount to more than inadvertence or negligence." *McHugh v. Olympia Entertainment*, unpublished, 37 Fed. Appx. 730, 2002 WL 1065948 (6th Cir. 2002) (emphasis added). Moreover, the Sixth Circuit has noted that "Section 1927 permits a federal court, in its discretion, to assess damages and costs directly against an attorney who 'multiplies the proceedings in any case unreasonably and vexatiously.' *This standard is met 'when an attorney knows or reasonably should know that a claim pursued is frivolous.'" Tareco Properties, Inc. v. Morriss*, 321 F.3d 545, 550 (6th Cir. 2003) (emphasis added) (quoting *Jones v. Continental Corp.*, 789 F.2d 1225, 1230 (6th Cir.1986)).

APPENDIX N

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:02-CV-485

[Filed June 13, 2005]

MARY SCOTT,
Plaintiff,

v.

METROPOLITAN HEALTH CORPORATION,
d/b/a METROPOLITAN HOSPITAL,
a Michigan corporation,

and

MICHAEL FAAS,
an individual, jointly and severally.
Defendants.

AFFIDAVIT OF AMY BROWN REGARDING PLAINTIFF'S SUR REPLY BRIEF TO DEFENDANTS' MOTION IN LIMINE RE: TAPES AND TRANSCRIPT EVIDENCE

STATE OF MICHIGAN)
)SS
COUNTY OF OAKLAND)

I, Amy Brown, state as follows:

1. I have been employed at Frank, Haron, Weiner & Navarro as a paralegal since January of 2004.

2. On July 8, 2004 I contacted IKON to reproduce copies of three micro-cassette tapes which were represented to me to be the 2/7/02 Board Meeting minutes the office received from Mary Scott.

3. On July 8, 2002, John Ware of IKON came to the offices of Frank, Haron, Weiner & Navarro to pick up the three micro-cassette tapes.

4. The next day, Mr. Ware returned with the three micro-cassette tapes we provided and two sets of copies.

5. In July 2004, I produced one of the sets of copies (containing three micro-cassettes), as they were given to me by Mr. Ware, to Defendants as part of Plaintiff's Rule 26 Disclosures.

6. I made no changes, alterations, or modifications of any kind to the tapes.

7. I am competent to testify to these facts if called upon to do so.

/s/_____
Amy Brown

Subscribed and sworn to before me
this 13" day of June, 2005

/s/_____
Joan M. Veihl
Genesee County, Michigan
Acting in Oakland County
My Commission Expires: 06/13/2011

APPENDIX O

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:02-CV-485

[Filed May 27, 2005]

UNITED STATES OF AMERICA,
ex rel. MARY SCOTT,
Plaintiffs,

v.

METROPOLITAN HEALTH
CORPORATION,
d/b/a METROPOLITAN HOSPITAL,
a Michigan corporation,

and

MICHAEL FAAS,
an individual, jointly and severally.
Defendants.

[Excerpt from PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION IN LIMINE REGARDING TAPE RECORDINGS AND TRANSCRIPTS, Pages 11-14]

* * *

[page 11]

4. The February 7, 2002 Enterprises Board Meeting:[9] This is the meeting as to which Plaintiff was accused of falsifying minutes (when she removed two statements from the draft minutes that she had seconded a motion approving the physician compensation model and inserted a statement that the managed care portion of the physician compensation model had been developed outside of Board approval), which charge was used as a pretext for Plaintiff's suspension. This issue was thoroughly briefed for the Court at pages 30-34 of Plaintiff's original Response in Opposition to Defendants' Motion for Summary Judgment. (Dkt # 425). All copies of this tape that remained in Plaintiff's possession were provided to Plaintiff's audio forensic expert in an effort to identify

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[9] The Court should note that Defendants relied on the February 7, 2002 tape (a copy) of the Enterprise Board Meeting Minutes in connection with their Motion for Summary Judgment to claim that Plaintiff was a compliance officer. In that Defendants have relied on this recording and have produced their own transcription of this meeting, they certainly should now be estopped from questioning the accuracy or evidentiary value of the tape (or a transcript derived therefrom).

whether it was an original recording. The audio forensic expert was unable to certify that the tapes are original recordings because he had no access to the recording device used by the Metropolitan employee (conceded by Defendants to be Diane Weist) who made the recording on Metropolitan equipment, which has not been found. **(Exh. 6)**[10] The CD copy of the recording that Plaintiff intends to introduce at trial, and the corresponding certified transcript, is attached as **Exh. 23** and **Exh. 14**, respectively. The Court is invited to listen to the CD, which is fully audible, and to follow the transcript, as the Court will determine that they bear the requisite "semblance of reliability" that renders both admissible. The CD and transcript of this recording are admissible for the following reasons:

a. Consistent with Mary Scott's deposition testimony and Defendants' statements in this case, the original recording consisted of three (3) tapes, two (2)of which had recordings on one side only. ***See*** **Exh. 3** at 376. Likewise, the tapes also consist of 3 tapes, identified by Plaintiff's expert as 2724 Side A, 2725 Side A and B, and 2726 Side A. (**Exh. 6**).

b. Of the three tapes that formed the basis for the CD hereby attached, two of the tapes showed earlier discussions which were recorded over at the 2/7/02

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[10] Again, Plaintiff provided her former counsel with the tapes, which were turned over to the Government. At time, Plaintiff did not appreciate the difference between a copy and an original. She did not destroy any tapes. (**Exh. 4**, ¶5).

meeting, interruptions and erasures consistent with the use of recycled tapes and the switching of new tapes as the tapes neared the end, which Plaintiff's audio forensic expert concluded were the result of poor re-recording techniques, rather than an attempt to create a deceptive message. Notably, the expert concluded that "it is very unlikely that the technical skill and expertise required through editing segments in and out of these recordings to create a deceptive message could be produced without detection." **Exh. 6**. As the Court can assess for itself by listening to the CD and following the transcript, the interruptions and erasures did not affect the continuity in the thread of the conversation such as to render the tape as a whole unreliable. Therefore, the tape and transcript are clearly admissible. *See, e.g., Avila, supra; Cash, supra; Cervera, supra; Cape, supra; Littwin, supra Byrne, supra; Brooks, supra.*

c. Moreover, Plaintiff urges the Court to review the specific statements that Plaintiff intends to introduce from the recorded 2/7/02 meeting because it will make it obvious to the Court that Defendants' ability to explain, defend or rebut these statements does not require that every word uttered at this meeting be preserved. Indeed, the substance of what was being discussed at the meeting is irrelevant to this case, but readily conveys the fact that Defendants, as of February 7, 2002, were knowledgeable about the FCA and about potential exposure related to the FCA to appreciate and understand (i.e., have "notice") that Mary Scott's complaints and strong language

regarding compliance matters presented a significant threat of FCA liability to the Hospital.

For example, the following statements stand on their own to show the sophistication of Metropolitan's leadership team as of early February 2002 as to False Claims Act liability and judicial actions. Such awareness negates Defendants' claim that they were oblivious to Plaintiff's notice. **Exh. 14** at p.19 (Dr. Cunningham: "At some point in time, if something gets ugly, them going and doing the whistleblowing . . ."), **Exh. 14** at p. 25 (Dr. Cunningham: . . . it could be helpful for Mike or I to . . . discuss the Askanazi (sic) case . . ."), **Exh. 14** at pp. 28 (Faas: ". . . I want to talk about one case in particular because it's so horrible and that's Askanazy(sic) in Greenville. . . . five years ago there were no FBI or Treasury agents in Western Michigan. We think there are dozens now . . . we would have been under scrutiny regardless, but [Askanazy] didn't help us over here."); **Exh. 14** at p. 42 (Faas (speaking of physician compensation as a basis of FCA liability): "what I don't want to get into, because that's what happened at St. Luke's Hospital. Because this stuff gets out and it's terrible once it's out."). As the Court is aware, both the Askanazi and the St. Luke Hospital cases were highly publicized False Claims Act cases against Hospitals and physicians.

Equally, statements which corroborate Mary Scott's claims that her corrections to the draft minutes were accurate - and the falsification charge was a sham - also stand on their own. By way of illustration, fully consistent with Mary Scott's testimony, the tape shows

that the meeting was a continuation of a previous meeting where Mary Scott had discussed the physician compensation model (and had requested review on the managed care portion by outside counsel), *Id.* at pp. 2; that Faas made a statement (which Plaintiff removed from the minutes) regarding the origins of the physician compensation model, statements which were substantively in accurate, *Id.* at pp. 9-10, 28; and that Dr. Cunningham did not make a motion that was seconded by Mary, a statement removed by her from the draft minutes, as the minutes clearly reflect that Faas instructed the secretary to record a motion and a second which did not occur anywhere in the meeting. *Id.* at pp. 46.

Finally, the recording shows that Faas's compliance standards were, in his own words, "dirt,"which is clearly relevant impeachment evidence to anticipated testimony by Defendants' that the Hospital went "all out" on compliance. *Id.* at pp. 35 (Faas (speaking of compliance): "You guys want a gold standard. I want a dirt standard.").

That these statements are extremely inculpatory is beyond question. However, how Defendants are precluded (i.e., "prejudiced") in anyway by brief interruptions in the recording from explaining exactly what they knew about the FCA cases they are heard discussing at the 2/7/02 meeting and what they meant

by the other statements on tape, respectfully, is nothing short of absurd.[11]

In sum, the tapes, the CDs and transcript of the 2/7/02 Enterprise Board Minutes are authentic and correct; changes, additions, and deletions have not been made to the recording; the recording has been preserved in an acceptable manner, the speakers are identified, the conversation is voluntary and without inducement; and the interruptions do not break up the thread of the conversation. The CD and the corresponding transcript are clearly admissible under the prevailing law.

* * *

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[11] Indeed, if Defendants want to put on evidence that "clears" them from the statements they made in the tapes, they certainly can put on that evidence from the horse's own mouth: the individuals who made the statements on the tapes, all of whom are employed by and within the control of Defendants.

APPENDIX P

Deposition Excerpts of J. Fraser, Docket No. 357-25, Exhibit 24, Brief in Support of Motion for Partial Summary Judgment

Case No. 1:02-CV-485

[Filed February 9, 2005]

UNITED STATES OF AMERICA, ex rel. MARY SCOTT, Plaintiffs,	)
v.	)
METROPOLITAN HEALTH CORPORATION, d/b/a METROPOLITAN HOSPITAL, a Michigan corporation,	)
and	)
MICHAEL FAAS, an individual, jointly and severally. Defendants.	)

[Excerpt of Deposition, pages 174-193]

[page 174]

given them for disclosure, so they may be out of order.

BY MR WEINER:

Q. Those are notes that you took, Mr. Fraser?

A. Yes, they are.

Q. This is a date I can truly read, which is 5/28/02?

A. I can't read mine, but that would make sense.

Q. Okay. It says: "Metro Hospital." And it says: "Minutes of board meeting." And then in brackets think that is probably telephone call with Diane Wiest?

A. Telephone conference.

Q. Telephone conversation?

A. With Diane Wiest.

Q. The comment, it says: "Physician comp. financial overview, removed certain portions." Then there is a comment and a question mark with "What to do"?

A. Right.

Q. Is this you saying to yourself what to do or is this Diane Wiest saying to you what to do?

A. It's one of those statements that probably encompasses both. Diane Wiest contacted me and asked me what she should do, and I was trying to figure out at the same time what to do.

Q. Okay. Now, just jumping ahead, I think there has

[page 175]

already been testimony that on June 12th, 2002 Mary Scott was placed on administrative leave?

A. Correct.

Q. And I think you've testified that at least one of the reasons that she was placed on administrative leave at that time had to do with what transpired with the minutes, which are the subject of your notes of 5/28/02?
A. That's right.
Q. Okay. Between May 28th or — not between — starting with May 28th and ending June 12th, did you have any conversation with Mary Scott regarding the minutes?
A. No, I did not.
Q. Why?
A. Because Mary Scott was being accused of modifying documentation within her control, somebody was raising that issue. The last thing I wanted to do was contact Mary. Because if Mary was making changes, Mary had that documentation within her control to continue to change things. I didn't want that to happen. I wanted to get a fair view of what it is that was going on.
Q. Take a look at the first page of this exhibit, 05254. On May 29th. '02 there was faxed to you

[page 176]

what is called Document A, which was stated to be the original document, or is the Mary Scott edited version. I'm sorry, I'm misreading this. It's Document B and A, correct? You were sent two?

MR. BACON: You may have misstated that.

BY MR. WEINER:

Q. Let me start again. As I read this, it says this is to Chris Lawrence?

A. Correct.
Q. From Jeff Fraser?
A. That's right.
Q. On May 29th, the day after your notes?
A. The day after Diane Wiest contacted me.
Q. Right. Okay. And you were saying to Chris Lawrence Document A is the original document, Document B is the Mary Scott edited version?
A. That's right.
Q. Okay. "Note the changes." And then asked her to can you after her review with Dr. Cunningham?
A. That's right.
Q. Okay. So you already had the changes in your possession, you had the changes that Mary had made and the document before she had made those changes, correct?
A. I had somebody sending me documentation alleging

[page 177]

that that's what Mary Scott did,
Q. Okay. And Mary Scott was a senior vice president at that time of Metropolitan Hospital?
A. Yes, she was.
Q. Mary Scott had made revelations to you of many compliance issues and concerns?
A. Your words, not mine. Mary Scott came to me and raised compliance issues. You said revelations, I'm not sure.
Q. Members of the executive committee or the board had stated, within an earshot of you, that Mary should be thanked for coming forward?

A. Thanked were not the words that I used; but, yes, they did make comments.
Q. Okay. And you didn't pickup the phone and call her and say: "Mary, what's this all about"?
A. Absolutely not.
Q. And 14 to 15 days after receiving this information from Diane Wiest Mary is placed on administrative leave?
A. As I told you, we had to determine whether or not there was any validity to any of this. And, yes, June 12 Mary was put on administrative leave.
Q. Without ever hearing from her why she made the changes?

[page 178]

A. Mary Scott was placed on administrative leave without directly contacting her first, that's correct.
Q. Between May 28th, 2002 and June 12, 2002, you conducted some form of investigation of the information you had received from Diane Wiest?
A. I began to conduct an investigation, yes.
Q. Did you talk to any individuals in conjunction with that investigation?
A. Yes.
Q. And who did you talk to?
A. Diane Wiest, Chris Lawrence, I believe Bill Cunningham to begin with.
Q. All right. You said to begin with. Who else?
A. You said between those two dates. I'm not sure if my other conversations were after June 12, or not. Those are the people that I recall between the end of May and the day that Mary Scott went out on

administrative leave, there was update to the executive committee about this issue.

Q. I'm just talking about from the day you first found out until the day she was placed on leave.

A. Those are the people I recall right now.

Q. Tell me what conversations you had with Bill Cunningham about this issue?

[page 179]

A. Simply trying to get a feel for who was in that meeting on February 7,2002; who was present; what was said; if there were tape recordings made by protocol; what the protocol for reporting minutes out and approving minutes was.

Q. What was your conversation with Chris Lawrence?

A. Same effect.

Q. Did you come up with a conclusion after talking with these three individuals as to what the protocol was for the preparation of minutes?

A. I came up with what I believed was the protocol, yes.

Q. And what was it?

A. That the meetings were tape recorded; that the tape recordings were put into a box; that Diane Wiest, as she had time, would take the tapes out and transcribe the large topics that were revealed on the tapes into a document; that those essentially were sent on for review, held until the next meeting and then approved.

Q. The February 7th minutes were of the board of directors of Metropolitan Enterprises, Incorporated, correct?

A. I believe so.
Q. At the time that you conducted your investigation

[page 180]

into these minutes, did you know who the members of that board were?
A. At the time I began the investigation.
Q. Yes?
A. No.
Q. At the time that you concluded it, did you know who the members of the board were?
A. I believe that I did.
Q. You did not -- strike that.
Did you talk to Michael Faas about this issue?
A. No.
Q. Who made the decision to put Mary Scott on administrative leave?
A. The executive committee.
Q. Made up of who?
A. Doyle Hayes, Vic Krause, Dave Ondersma. There are a couple other members. I don't recall the name at this point. I think there were five members on the executive committee.
Q. Was Bill Cunningham one of them?
A. No.
Q. Chris Lawrence?

A. No.
Q. So just to say you did the investigation?

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A. The preliminary investigation.
Q. Was there a follow-up investigation after yours?
A. Certainly, after we put Mary Scott on administrative leave.
Q. No, before?
A. No. My investigation was preliminary to determine whether or not to put Mary Scott on administrative leave.
Q. Okay. And the decision to put Mary Scott on administrative leave was made by individuals who you never talked to about this issue prior to June 12th, 2002?
A. No. That is not what I said. I advised the executive committee of the issue. The executive committee made the decision to put Mary Scott on administrative leave.
Q. Let me break it down. Maybe I'm not being artful enough. You were first alerted to this potential problem on May 28th?
A. Whatever the day Diane Wiest contacted me.
Q. Your notes indicate May 28. Do you have any reason to believe you knew about this before or after that date?
A. No. That's the date, that's when she contacted me.
Q. You testified that you talked with -- as part of

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your investigation. you talked with three different people?

A. As part of my investigation, I talked to three different people.

Q. Then I believe I asked you if you had discussed this issue prior to June 12th with anybody else?

A. And I believe my response was I didn't talk to anybody by way of investigation, but I updated the executive committee about the issue.

Q. Was that done orally?

A. Yes.

Q. And who did you talk to?

A. I already told you who I talked to on the executive committee. Dick Krause. Doyle Hayes, Dave Ondersma, and I don't remember the two other names of the people on the executive committee.

Q. So you had some form of oral conversation with each one of those people prior to June 12th on this issue?

A. Not separately. They were together.

Q. And was that a formal meeting of any kind?

A. It would have been a meeting that was called to discuss the issue.

Q. And were there minutes taken at that meeting?

A. I don't know whether there was minutes taken of the

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meeting.

Q. Would the protocol dictate minutes be taken at the meeting?

A. I don't know. It wasn't the meeting I was investigating. It was a different body, different entity. I'm not sure what the protocol was.

Q. I'm sorry, when you said --just a second. When you say "different entity," we're talking about Metropolitan Enterprises, Incorporated?

A. You asked me whether I knew if minutes were supposed to be taken of the executive committee meeting. I don't know whether they are. I don't know whether that is part of their protocol. The investigation I was involved in related to the MSO, and I told you what the protocol for that was.

Q. So you're stating that it's possible that the protocol for taking of minutes for the board of Metropolitan Enterprises, Incorporated, is different than it is for Metropolitan Hospital?

A. I'm stating that I don't know what the protocol for taking minutes is for the executive committee.

Q. Where did this meeting take place?

A. The executive committee meeting.

Q. The one that took place between May 28 and June 12?

A. I don't know where it took place.

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Q. Who called the meeting?

A. One of two or three different people. It could have been me, it could have been Larry Burns, it could have been Kathy Maine.
Q. They have the authority to call a meeting?
A. They had the authority to contact Doyle Hayes and have Doyle call a meeting.
Q. But you don't know who called the meeting?
A. I don't know.
Q. Who was present?
A. I think I have answered that three times.
Q. Any body other than the board members you've identified and yourself?
A. I don't remember if there were other lawyers from Varnum. It could have been Larry Burns and Kathy Maine as well.
Q. Did you present any kind of written report to that board at that time?
A. I don't remember whether I did or didn't. There were so many executive committee meetings that we were having, some of which were written documentation, some of which were verbal.
Q. Do you remember the date of the meeting?
A. I don't remember the specific date of the meeting, no.

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Q. Did you take any notes at that meeting?
A. I'm sure that I took notes at the meeting.
Q. If you did, would they have been in your file?
A. It would have been presented to Rhoades on their request for my documents.

Q. Who at Varnum would have been assigned to review a form of compensation model for Metropolitan if it was submitted to your firm for review?
A. I don't know.
Q. As part of your investigation, did you determine whether your firm had ever reviewed a compensation model for Metropolitan?
A. The compensation model was a compliance issue. It wasn't something that I worked on.
Q. That wasn't my question. My question to you was: Did you ever, as part of your investigation of the minutes, determine whether any compensation model had ever been submitted by Metropolitan to your law firm for review?
A. My answer was the compensation model was, compliance was not part of what I did.
Q. Do you realty not understand my question or are you fencing with me?
A. I will answer my question the best way I can. I'm trying to.

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Q. You were sent two forms of minutes referred to as A and B, correct?
A. I believe that received two forms.
Q. Did you read those minutes?
A. Yes.
Q. Do you recall the issue that was being discussed by the board where Mary Scott is accused of having made inappropriate edits?
A. Not offhand I don't.

(WHEREUPON, Exhibit No. 33 and No, 34 Were Marked For Identification.)

BY MR. WEINER:

Q. Take a look at Exhibit 33.

MR. NECKERS: I assume that is the one with the A on it.

MR. WEINER: It is.

THE WITNESS: Okay.

BY MR WEINER:

Q. Take a look at the third fill paragraph on the first page.

A. All right.

Q. There is a longhand marking in the left-hand margin alongside that paragraph. I believe it says: "MS took out"?

A. That's what it says.

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Q. Whose handwriting is that?

A. That's mine.

Q. And what subject matter does that paragraph deal with?

A. It looks like it deals with employed physician compensation.

Q. And the first line talks about that: "Discussion was held on when the last time the compensation model was reviewed by outside attorney"?

A. That is the first sentence, yes.

Q. Now, if you take a look at Exhibit 34?

A. All right.

Q. In the third full paragraph there is a longhand in the margin, it says: 'MS edits in"?

A. Yes.
Q. Is that your handwriting?
A. Yes.
Q. And what is the subject matter of that paragraph?
A. There are two subjects of that paragraph.
Q. What is the subject of the bracketed portion on the left-hand margin, indicates "MS edits in"?
A. The managed care yearly adjustment to the compensation model.
Q. In that you reviewed these minutes at the time that they were received. I repeat my question. As part

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of your investigation, did you determine whether your law firm had ever reviewed the compensation model for Metropolitan Hospital?
A. At the risk of having you --

MR. BACON: Why don't you --

THE WITNESS: No, no, no. I'm going to answer the question. That was not part of what I was doing. What I was doing was checking to see whether or not there had been a change to the original minutes compared to the second. So, no, I did not review the compensation model. At my firm, that is a compliance issue.

(WHEREUPON, Exhibit No. 35 Was Marked For Identification.)

BY MR. WEINER:
Q. Have you had a chance to take a look at that document, Exhibit Number 35?
A. Yes. I have reviewed Exhibit 35.

Q. The cover sheet indicates that this is a June 27th document to Jeff Fraser from Mary Scott regarding response to questions. The first paragraph makes reference to questions that you -- and I'm assuming that means Jeff Fraser -- had outlined in a memo dated June 13,2002. Had you set forth certain questions for Mary Scott to answer in a memo dated

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June 13, 2002?

A. Yes.

Q. Why?

A. Because we were continuing to investigate whether or not Mary Scott changed, deleted information from the meeting minutes as part of our investigation. That's why Mary Scott was on administrative leave, to get to the bottom of that issue.

Q. So this was a continuing investigation into the question about the minutes?

A. Yes, it was.

Q. It didn't cover any other issues?

A. My letter didn't cover any other issues.

Q. Take a look at 05637, please. And this continues on several other pages, but there is longhand notes in the margin. Is that your writing?

A. Yes, they are.

Q. This document, which are the responses from Mary Scott to you, did you make -- strike that.

Did you forward these answers, copying same, to any other person?

A. No.
Q. You kept these strictly for yourself?
A. They were sent to me by Linn Hynds and I reviewed them myself

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Q. Did you share the content of any of these responses with any other person?
A. Yes.
Q. With who?
A. The executive committee, probably other lawyers within our firm, and there may have been others. I don't recall right now.
Q. Okay. Let's take a look again at 05637. Alongside the end of the first paragraph and beginning of the second paragraph, if I read it correctly, it says: "Nonsense, complained all the time"?
A. That's right.
Q. What does that mean?
A. It means, as part of the investigation into this matter. I had been told by others that these complaints had been made, and complaints had been made by Ms. Scott on a repeated occasion.
Q. Is it safe for me to assume that since you said "nonsense," that at this point in time you had chosen to believe others and not believe Mary Scott?
A. At this point in time, I was trying to come to a conclusion about whether or not Ms. Scott had followed protocol, had breached protocol, had violated our agreement to maintain information

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confidential, not to change documentation. It was becoming pretty clear to me that Ms. Scott was not following those requirements.

Q. So it was your conclusion that her position was nonsense?

A. No. It wasn't my conclusion that her position was nonsense. It was my conclusion that pieces of information that Ms. Scott was providing to me were not true.

Q. If you take a look at the bottom of the page, the paragraph starting: "During the period of 1999 to 2002," there is a bracket and it says "nonsense"?

A. That's right.

Q. Same type of conclusion?

A. Same type of conclusion.

Q. If you go to 05639, the incomplete paragraph right at the top, in the margin, it says: "Suits MS purpose." Am I reading that correctly?

A. That's correct.

Q. What purpose are you talking about?

A. It appeared to me, based on what had been edited out and edited in, that Mary Scott was attempting to build her record, to try and approve one of her compliance pieces.

Q. And you knew that how?

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A. As I told you, I had spoken to other individuals and now Mary Scott and her lawyer about these issues.

Q. Question one on that same page, which is the next paragraph, in the margin I believe the word is "crap"?
A. That is the word.
Q. Page 05640, third paragraph: "Mary left the minutes on her hard drive." Note in the margin, "crap"?
A. That's what it says.
Q. Two paragraphs down on the left-hand margin, bracket, and I can't read -- I can read the word "crap," but I can't read what is above it?
A. I don't know what the blank is. Something has been cutout, but it says: "At a crap."
Q. Next paragraph down, on the right-hand margin, does it say "MS, ruse"?
A. That's what it says.

MR. WEINER: I'm going to stop for the day.

(WHEREUPON, Volume I of Deposition Concluded at 4:45 p.m.)

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STATE OF MICHIGAN).
) SS
COUNTY OF KENT)

I, ANNETTE R. BLOUGH, RPR/CSR-5191 and Notary Public in Barry County and acting in the County of Kent, State of Michigan certify that the foregoing deposition was taken before me at the time and place hereinbefore set forth and that said witness was duly sworn by me to tell the truth.

I FURTHER CERTIFY THAT this deposition was taken in shorthand by me and transcribed with the aid of a computer, and that it is a true and accurate transcript of my original shorthand notes.

I FURTHER CERTIFY THAT I am not a relative or employee of or an attorney for a party, or financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand this 22nd day of October, 2004.

/s/_____

Annette R. Blough, RPR/CSR-5191 and
Notary Public for Barry County acting
In Kent County, Michigan
My Commission expires 01-17-06

APPENDIX Q

STATUTES

31 U.S.C. § 3730

TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT

31 USC § 3730

§ 3730. Civil actions for false claims

* * *

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for

the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

* * *

FEDERAL RULES OF CIVIL PROCEDURE
V. DEPOSITIONS AND DISCOVERY

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

* * *

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, response, or objection made by a party represented by an attorney shall be

signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

> (A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;
>
> (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and
>
> (C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of the rule, the court, upon motion

or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

* * *

FEDERAL RULES OF CIVIL PROCEDURE

V. DEPOSITIONS AND DISCOVERY

Rule 37. Failure to Make Disclosures or Cooperate in Discovery; Sanctions

* * *

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the

failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C) and may include informing the jury of the failure to make the disclosure.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (A) the request was held objectionable pursuant to Rule 36(a), or (B) the admission sought was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit.

* * *

FEDERAL RULES OF CIVIL PROCEDURE
VII. JUDGMENT

Rule 56. Summary Judgment

* * *

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of

delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.